87-2051

(1)

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1987

M.J.R., INC., et al.,
Petitioners,

v.

CITY OF DALLAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is an ordinance which prohibits the operation of a lawful business which presents sexually oriented, nonobscene entertainment, by any person who has been previously convicted of an obscenity offense or certain other crimes, or whose spouse has been so convicted, an unlawful prior restraint, as condemned in *Near v. Minnesota*, 283 U.S. 697 (1931) and as suggested in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986)?

2. Is a municipal ordinance which requires a license before one may engage in protected expression, and which fails to provide the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965) after denial or revocation of a license, an unlawful prior restraint?

3. Is a zoning ordinance which forces the closure of 100% of a city's adult cabarets, and 92% of all adult businesses, subject to strict scrutiny under *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), or to the deferential standard of review allowed for prospective zoning regulations in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)?

4. Does an ordinance restricting adult cabarets to mostly industrial, poorly lit, unsafe areas where economic survival is virtually impossible, thus drastically reducing the number of adult cabarets, violate the requirement of *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) that a

city must refrain from denying such businesses a reasonable opportunity to open and operate?

5. May a city, through zoning, close every adult cabaret in the city, even though they had been operating lawfully for many years while causing no adverse secondary effects, or must the ordinance apply to new businesses only, as indicated in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)?

LIST OF PARTIES

There were three groups of Appellants in the consolidated case in the Court of Appeals. Petitioners herein are listed in Group I, and all other Appellants in Group II.

I.

M.J.R., Inc.; Tempo Tamers, Inc.; S.B. LaBare, Inc.; Allen & Burch, Inc.; Southern Belles Partnership, Inc.; D. Burch, Inc.; Deja Vu, Inc.; Corporation Lex, Inc; and S.B. Youngbloods, Inc.

II.

FW/PBS, Inc.; DSB, Inc.; Lone Star Multi Theatres, Inc.; Bi-Ti Enterprises, Inc.; Gattie Corporation; J.R.E. Enterprises; Entertainment Unlimited; Charles E. Carlock; Beverly K. Van Dusen; Bill Staten, Jr.; Calvin Berry, III; Saujay Patel; Rudolph Fernandez; and Dallas Motel Association.

The following parties were Appellees in the Court of Appeals: The City of Dallas, Texas; A. Starke Taylor, Mayor; and Billy Prince, Chief of Police.[1]

There are no entities to report or list pursuant to this Court's Rule 28.1.

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[1] Pursuant to Supreme Court Rule 40.3, former Mayor Taylor and former Chief of Police Prince, will be replaced in this case by their successors in office, Mayor Annette Strauss and acting Chief of Police Louis Caudell. Mayor Taylor and Chief Prince were sued in their official capacities only.

A. The Court of Appeals' Conclusion That it is Constitutionally Permissible for a City to Deny a License to Engage in Future Speech Activities Because of a Past Violation of an Obscenity Law or Other Law Conflicts With This Court's Opinion in *Near v. Minnesota*, 283 U.S. 697 (1931), and With Numerous Opinions of the Federal Courts of Appeals and State Courts of Last Resort. 9

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported as *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988) is reprinted in Appendix A. The opinion of the United States District Court for the Northern District of Texas, reported as *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986), is reprinted in Appendix B. The order of the Court of Appeals denying the petitions for rehearing and suggestions for rehearing *en banc* is reprinted in Appendix C. The order of this Court granting a stay of the

judgment and mandate of the Court of Appeals is reprinted in Appendix D.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its opinion on February 12, 1988. A petition for rehearing and suggestion for rehearing *en banc* were timely filed. The order denying rehearing and rehearing *en banc* was entered on March 14, 1988. This petition is filed within 90 days of that date. The opinion of the Court of Appeals, upholding the final judgment of the District Court, dismissing Petitioners' claims of the abridgment of rights guaranteed by the First Amendment to the United States Constitution, constitutes a final judgment in a civil case. This Court has jurisdiction pursuant to 28 U.S.C. § 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law . . . abridging the freedom of speech . . .

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS OF DALLAS CITY CODE

Chapter 41A of the City Code of Dallas, Texas is included in its entirety as an appendix to the opinion of the District Court, and is reprinted in Appendix B.

STATEMENT OF THE CASE

Petitioners each operate an adult cabaret[2] in the City of Dallas, Texas. Each Petitioner was in business prior to June 18, 1986. The cabarets had operated lawfully, without causing any deleterious effects on surrounding neighborhoods, for many years.[3] Many were in areas where commercial property had steadily risen in value during the entire time they were there, and where the crime rate was low.

On June 12, 1986 the Dallas City Plan Commission recommended to the City Council the adoption of a proposed ordinance restricting locations where adult businesses could

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2 An "adult cabaret," defined in § 41A-2(2) of the ordinance, is a commercial establishment which regularly features nonobscene entertainment in which performers dance while semi-nude.

3 When asked by the District Court if there was any evidence that the cabarets in Dallas had caused any adverse secondary effects, the City replied that it had relied on a study done in Austin, Texas.

operate, and imposing licensing and inspection requirements on them. The Council enacted the ordinance on June 18, 1986.

The Council saw no evidence relating to the city's adult cabarets. Nor was the Council advised that the zoning provisions would close 92% of the adult businesses in the city, including every one of the adult cabarets. The ordinance created a licensing scheme for all adult businesses, and imposed zoning restrictions on them. The ordinance took effect upon passage,[4] but contained an amortization clause allowing adult businesses which were in violation of the zoning restrictions to continue in operation for three years.

The impact of the zoning provisions is severe. It was uncontroverted at trial that of approximately 120 adult businesses in operation in the City at the time the ordinance was enacted, about 110 will have to close their doors and seek new locations by June 18, 1989. Every one of the City's 29 adult cabarets faces closure.[5] The Cabarets had presented considerable evidence to demonstrate that their physical

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4 As the City acknowledged in its Response to Motion for Stay of Mandate filed in this Court, the licensing prohibitions have already been used against two persons to revoke licenses for convictions of obscenity offenses.

5 The court held that because the land areas where adult businesses could locate comprised approximately 9% of the city, and were accessible by major roadways, there was reasonable opportunity for such businesses to relocate. The trial court did acknowledge, during argument on the motions for summary judgment, that Petitioner S.B. LaBare wold be forced to move to areas where not enough of its female customers would be willing to go to allow the business to remain open, and that it would probably be forced out of business.

requirements -- such as building size, traffic access, and parking areas -- were very different from those of most other adult businesses. Thus, the cabarets argued that while the areas established might be suitable for some types of businesses, such as escort services, they were effectively unavailable for adult cabarets.[6] In competing for entertainment dollars, the cabarets depend upon affluent customers who have financial means, a clientele that would avoid the relocation areas designated by the City. The City's evidence did not address this contention, and the trial court never considered it.

The areas in which new businesses must compete for space -- including the 110 businesses to be closed by the ordinance -- are mostly industrial zones, with poor lighting, no retail activity, and high crime rates. This factor is important in light of the statement in the ordinance that "it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market." The city offered no evidence, or explanation, of the repudiation of this avowed purpose by its ultimate solution that would move adult cabarets from areas which do not have high crime rates to areas that do and where economic death awaits.[7] Three lawsuits

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6 The City has never claimed, -- before the Plan Commission, the City Council, the District Court or the Court of Appeals -- that the ordinance would not severly reduce the number of adult *cabarets*. The City has only argued that it will not reduce the number of adult *businesses*.

were filed in the United States District Court challenging Chapter 41A. The cases were consolidated, and the trial court requested all parties to file motions for summary judgment. On September 12, 1986 the court granted the motion filed by the City, upholding virtually all of the ordinance, and dismissed the cases. The court held that denial of a license to one who has been convicted of a sex-related offense furthers the city's purpose of preventing crime in adult businesses.[6]

The trial court rejected as irrelevant the testimony of the adult cabarets that they could not survive economically if they were forced to relocate into the predominately industrial, poorly lit, unsafe, high crime areas; the court called that a "business judgment." App. B-20, n.23.

A timely appeal was taken to the United States Court of Appeals for the Fifth Circuit. On February 18, 1988 that Court, in a 2-1 decision, affirmed the trial court granting summary judgment in favor of the City.

The majority declined to apply a strict scrutiny standard of review, finding that a restriction on sexually oriented expression need only be reasonable. Stating that because the licensing provisions regulated sexually oriented expression,

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7 Even the City's expert at trial, Leon Hurse, while claiming that there were approximately 200 sites where adult businesses could locate, identified only two potential sites for adult cabarets.

8 Neither the Plan Commission nor the City Council were presented with any evidence that there *was* any crime in the city's adult cabarets. And the only evidence of criminal activity presented by the City to the district court -- doesn't even mention adult cabarets.

and ruling that that type of speech is entitled to less First Amendment protection than other forms of constitutionally protected expression, the majority analyzed the licensing restrictions under the more deferential standard of review applied to time, place and manner regulations.

Applying that lesser standard of review, the majority held that because the relationship between the specific crimes for which convictions cause license disqualification and the "evil to be regulated is direct and substantial," the ordinance' criteria for denying or revoking a license were sufficiently narrowly tailored to be constitutional. The Court of Appeals, like the District Court, also rejected Petitioners' argument that the licensing ordinance should have included procedural safeguards designed to prevent unlawful prior restraints, as required by *Freedman v. Maryland*, 380 U.S. 51 (1965).

In his dissent, Judge Thornberry stated that the licensing provisions were an unconstitutional prior restraint of activities protected under the First Amendment.

The panel unanimously upheld the zoning restrictions. Although the ordinance prohibited adult businesses from locating within 1,000 feet of churches, schools, residential districts, individual residential units and public parks, the panel referred only to the restriction against locating a sexually oriented business within 1,000 feet of another such business. This provision, the panel held, furthered the announced purpose of the ordinance to prevent a concentration of adult

businesses in any area. The panel did not indicate how the other provisions prevented a concentration.

As both the District Court and the Court of Appeals noted, there was no study done by the City of Dallas as to whether previously existing adult businesses had caused any adverse secondary effects. The commission saw no evidence relating to the city's adult cabarets. No report discussed the types of districts in which they were located. No evidence indicated that they had caused any impact on nearby property values, or that crime rates were higher in their neighborhoods.

Finally, the panel concluded that the zoning restrictions, which left about 8% of the city's land area available for adult businesses, provided reasonable alternative avenues of communication. The panel did not discuss Petitioners' evidence, that the alternative sites might support some types of businesses, but that adult cabarets would be practically eliminated from the city.

Petitions for rehearing and suggestions for rehearing *en banc* were denied on March 14, 1988. On May 4, 1988 this Court entered a stay of the judgment of the Court of Appeals except the portion upholding the zoning provisions of the ordinance.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS UPHOLDING THE DALLAS LICENSE REQUIREMENT FOR ADULT ENTERTAINMENT BUSINESSES CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, THE FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT.

A. The Court of Appeals' Conclusion That it is Constitutionally Permissible for a City to Deny a License to Engage in Future Speech Activities Because of a Past Violation of an Obscenity Law or Other Law Conflicts With This Court's Opinion in *Near v. Minnesota*, 283 U.S. 697 (1931), and With Numerous Opinions of the Federal Courts of Appeals and State Courts of Last Resort.

By a 2-1 opinion, the Court of Appeals not only concluded that a city may deny a license to engage in future speech activities because of a prior obscenity violation or other offense,[9] but also concluded that this restriction on speech

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[9] The offenses are: prostitution; promotion of prostitution; aggravated promotion of prostitution; compelling prostitution; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault or aggravated sexual assault; incest, solicitation of a child, or harboring a runaway child; any violation of Chapter 41A (the ordinance challenged herein); or criminal attempt, conspiracy or solicitation to commit any of the foregoing offenses.

should be analyzed under a deferential standard of review, rather than the strict scrutiny traditionally required of any law requiring a license to engage in First Amendment activity. The majority refused to require the city to demonstrate a "compelling necessity" for the occupational bars it enacted, concluding: "On balance we are persuaded that only a 'substantial relationship' need be shown between the conviction and the evil sought to be prevented." App. A15.

Applying this erroneously deferential standard of review, the Court of Appeals upheld a broadly sweeping prohibition which clearly violates the limits this Court and lower federal courts have consistently placed upon such regulation of First Amendment activity. The Court of Appeals held that the City of Dallas could deny speech rights prospectively because of a prior speech violation, a conclusion patently in conflict with this Court's decision in *Near v. Minnesota*, 283 U.S. 697 (1931). The majority opinion also conflicts with a 14 - 0 *en banc* opinion of the same Circuit, *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 165-66 (5th Cir. 1978) (*en banc*), *aff'd on other* grounds, 445 U.S. 308 (1980), deciding that a nuisance law would be unconstitutional if used to padlock a bookstore or theater because of prior obscenity violations.[10]

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10 The ordinance upheld in this case even permits the forfeiture of free speech rights solely because one's spouse has previously been convicted of an obscenity offense or some other type of crime. Neither the District Court nor the Court of Appeals suggested how the prohibition against one

The majority opinion is also in conflict with a myriad of other decisions of the federal appellate courts and state courts of last resort which have concluded that prior obscenity violations cannot justify the prospective interference with First Amendment rights by the denial or revocation of a business license or the padlocking of a bookstore or theater where the offense was committed.[11]

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whose spouse has been convicted furthers any legitimate governmental purpose, much less a compelling interest.

11 The following cases have held unconstitutional laws which allow a permit to be either denied or revoked upon proof of a prior obscenity violation: *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *Genusa v. City of Peoria*, 475 F. Supp. 1199, 1207-09 (C.D. Ill. 1979), *aff'd*, 619 F.2d 1203, 1217-20 (7th Cir. 1980); *Gayety Theaters, Inc. v. Carson*, 470 F. Supp. 1140 (M.D. Fla. 1979); *San Juan Liquors v. Consolidated City of Jacksonville*, 480 F. Supp. 151 (M.D. Fla. 1979); *Yuclan Enterprises, Inc. v. Arre*, 488 F. Supp. 820 (D. Hawaii 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F. Supp. 994 (S.D. N.Y. 1972); *Natco Theaters, Inc. v. Ratner*, 463 F. Supp. 1124 (S.D. N.Y. 1979); *Oregon Bookmark Corp. v. Schrunk*, 321 F. Supp. 639 (D. Ore. 1970); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D. Utah 1980); *Perrine v. Municipal Court*, 448 P.2d 648 (Cal. 1971), *cert. denied*, 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz County Board of Supervisors*, 128 Cal.App.3d 369, 374-75, 181 Cal.Rptr. 1, 3-4 (1982); *City of Delevan v. Thomas*, 334 N.E.2d 190 (Ill. 1975); *Alexander v. City of St. Paul*, 227 N.W.2d 370 (Minn. 1975); *Hamar Theatres, Inc. v. City of Newark*, 374 A.2d 502 (N.J. 1977); *People v. J.W. Productions*, 413 N.Y.S.2d 552 (N.Y.C.Cr.Ct. 1979); *City of Seattle v. Bittner*, 505 P.2d 126 (Wash. 1973); *see also, Intern. Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-33 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-30 (1981); *cf. Chulchian v. City of Indianapolis*, 477 F. Supp. 128, 131-32 (S.D. Ind. 1979), *aff'd*, 633 F.2d 27,30 (7th Cir. 1980); *Marks v. City of Newport, Kentucky*, 344 F. Supp. 675 (E.D. Ky. 1972).

The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: *Universal Amusement Co. v. Vance*, 587 F.2d 159, 164-66 (5th Cir. 1978) (*en banc* -- as to this point, all fourteen judges of the court were in agreement), *aff'd on other grounds*, 445 U.S. 308 (1980); *Pollitt v. Connick*, 596 F. Supp. 261, 269-72 (E.D. La. 1984);

Additionally, insofar as the Court of Appeals upheld the balance of the statutory grounds for disqualification without requiring the showing of a "compelling necessity," its opinion also conflicts with numerous decisions of this Court holding that fundamental First Amendment rights cannot be abridged unless the government proves such a compelling necessity. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), and cases cited therein.

By authorizing the denial of a license on grounds which are not proven to be of compelling necessity, the majority's opinion also conflicts with a long line of this Court's cases holding that laws requiring a license to engage in First

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General Corp. v. Sweeton, 320 So.2d 668 (Ala. 1975), *cert. denied*, 425 U.S. 904 (1976); *People ex rel. Busch v. Projection Room Theater*, 550 P.2d 600 (Cal. 1976), *cert. denied*, 429 U.S. 922 (1976); *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla. 1971); *Sanders v. State*, 203 S.E.2d 153 (1974); *People v. Sequoia Books*, 518 N.E.2d 775 (Ill.App. 1988); *State ex rel. Blee v. Mohney Enterprises*, 289 N.E.2d 519 (Ind.App. 1973); *Kansas v. Motion Picture Entitled "The Bet"*, 547 P.2d 760; (Kan. 1976); *Giarusso v. D'Iberville Gallery*, 295 So.2d 891 (La. 1974); *Gulf States Theaters of Louisiana v. Richardson*, 287 So.2d 480; (La. 1974); *Parish of Jefferson v. Bayou Landing Ltd.*, 350 So.2d 158 (La. 1977) (*overruling* La.App., 341 So.2d 23); *Society to Oppose Pornography v. Thevis*, 255 So.2d 876 (La.App. 1972); *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Commonwealth ex. rel. Davis v. Van Emberg*, 347 A.2d 712 (Penn. 1975); and *New Rivieria Arts Theatre v. Davis*, 412 S.W.2d 890 (Tenn. 1967). *See also, J.R. Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 494-95 (9th Cir. 1984), *rev'd on other grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Nihiser v. Sendak*, 405 F. Supp. 482, 491-92 (N.D. Ind. 1974), *vacated and remanded on other grounds*, 423 U.S. 976 (1975:), *order re-entered* August 16, 1976 (unpub.), *aff'd*, 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 612, n. 23 (1975). *Cf. Speight v. Slaton*, 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch,"* 307 N.E.2d 911 (Ohio 1974).

Amendment activity must be subjected to much more exacting scrutiny than those which license nonexpressive conduct.[12] These cases recognize: (1) that the requirement of a license before one may engage in expression is the kind of prior restraint most hated by the Framers; and, (2) such laws must be subjected to the strictest level of scrutiny to ensure against the possibility of censorship under the guise of regulation.

Moreover, strict scrutiny of even the nonexpressive disqualification criteria is in no way inconsistent with this Court's opinion in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Although the Court in that case upheld an *in rem* closing of an adult bookstore due to illegal acts manifesting "no element of protected expression," the Court carefully distinguished the situation where a prospective ban on speech would generally apply at all locations. By contrast, the denial of a license for prior noncommunicative illegal conduct is an outright restraint on all future expression at any location.

Persons convicted of the various crimes of disqualification in the Dallas ordinance are not categorically barred from obtaining *any* licenses, but are only prohibited from obtaining a license to operate an adult entertainment business.[13] Thus, this case also involves the situation where an ordinance, based in part on nonexpressive activity,

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12 *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Saia v. New York*, 334 U.S. 558 (1948); *Lovell v. Griffin*, 303 U.S. 444 (1938); and *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)

13 See § 41A-4(c) and (e) and § 41A-5(a).

singles out those engaged in expression for imposition of its burden.

The importance of the questions presented by this case is further underscored by the fact that this Court has granted review in *Fort Wayne Books, Inc. v. Indiana, cert. granted,* ____ U.S. ____, 108 S.Ct. 1106 (1988), which poses a similar constitutional question: whether prior obscenity violations can justify an injunction against future speech.

The licensing issue decided by the Court of Appeals involves constitutional questions of nationwide importance. If this ordinance is sustained, the prior restraint doctrine and the security of First Amendment freedoms generally will be greatly undermined. Similar laws targeting communicative businesses for license denial or revocation upon the commission of a speech-related offense or virtually any other violation, no matter how petty, would threaten the very existence of innumerable First Amendment businesses. In principle, nothing would prevent the passage of legislation authorizing the closure of newspapers by forfeiture of licenses for instances of defamation. Because the Court of Appeals' opinion has such wide-ranging implications and conflicts with the applicable decisions of this Court, and many other courts this Court should grant review.

B. By Analyzing a License Requirement for Adult Entertainment Businesses Under the More Deferential Time, Place and Manner Standard of Review, the Court of Appeals

Rendered a Decision Contrary to This Court's Decisions Defining a Time, Place and Manner Regulation.

Review should also be granted in this case to correct the confusion caused by the Court of Appeals' misapplication of the standards for reviewing time, place and manner regulations of speech to an ordinance which regulates neither the time, place nor manner of speech but, instead, requires a license as an absolute prerequisite to engage in constitutionally protected expression.

In Point III of its opinion, the Court of Appeals upheld the license requirement for all adult entertainment businesses against Petitioners' challenge that it was facially invalid because it lacked adequate procedural safeguards to guarantee that it could not be used as a tool for censorship by either inherent or intentional delay. Before dealing specifically with the argument that the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965) should be required of such a licensing law, the Court of Appeals stated its belief that *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) had held that adult entertainment businesses are entitled to a lesser degree of procedural safeguards and other First Amendment protections than those engaged in other types of First Amendment activity, including "followers of the Krishna religion" who, the court noted, successfully challenged an airport solicitation licensing law in *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124

(1982), due to its lack of procedural safeguards. App.A-6. Bluntly summarizing what it believed to be this Court's holding in *Renton*, the Court of Appeals stated: "[T]he Court held that sexually-explicit materials deserve less first amendment protection than other kinds of speech." App. A-8.

Review of this aspect of the Court of Appeals opinion is crucial for two distinct reasons. First, in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), a majority of the members of this Court rejected the dangerous and unprecedented notion that nonobscene sexually-oriented expression is deserving of less First Amendment expression than less controversial types of expression.[14] *Renton* did not overrule that precedent but merely concluded that regulations of the time, place or manner of operating establishments primarily devoted to the sale or exhibition of such materials may be permissible if the *justification* for such time, place and manner restrictions is content-neutral. If the

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14 In *Young*, this majority consisted of dissenting Justices Stewart, Brennan, Marshall and Blackmun, joined in this point by Justice Powell, who concurred in the judgment. 427 U.S. 73, n. 1 (POWELL, J., concurring): "I do not think we need reach, nor am I inclined to agree with, the holding in Part III . . . that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression."

Justice Powell reiterated this position in his subsequent concurring opinion in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) when he refused to join in a portion of the court's plurality opinion because he did "not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection.

Court of Appeals' decision is allowed to stand, it will create precedent for the extremely dangerous proposition that the degree of protection to be afforded a particular type of speech diminishes with the amount of controversy surrounding it. However, it is precisely when speech is most controversial that the full protection of the First Amendment is most needed. This Court should grant review in order to address squarely this most fundamental of First Amendment issues.

Second, by concluding that a content-based licensing law (applicable only to sexually-oriented businesses) should be analyzed as a "time, place or manner" restriction, the Court rendered an opinion in conflict with all of this Court's prior decisions defining a time, place or manner regulation. A law requiring a license as a prerequisite to engage in speech regulates neither the time, the place nor the manner of speech but, instead, as noted by dissenting Judge Thornberry, "the denial of a license completely bans the speech of the person denied and does not leave the speaker alternative avenues of communication." App. A-21. As this Court pointed out in *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938), the "leading purpose" in adoption of the First Amendment was to permit speech activities *without* the prior restraint of a license requirement. This Court's prior decisions have uniformly recognized that any licensing law for speech-related activities imposes, by definition, a prior restraint and is only permissible

if attended by strict procedural safeguards to guarantee against its misuse as a tool for censorship.[15]

Under the test which the Court of Appeals mistakenly derived from *Renton*, license requirements for adult businesses are presumed to be content-neutral, and on that basis are not required to be subjected to strict scrutiny. Yet many of this Court's cases (cited in n. 15, *supra*) involved content-neutral licensing laws which had the potential to be used as tools of censorship. For this reason, the cases cited have required that licensing laws (as opposed to time, place or manner regulations) must be strictly scrutinized to make sure there is no possibility they can be abused by those who would seek to engage in impermissible censorship. Moreover, as *Freedman* pointed out, the potential for censorship is not limited to the situation where a license law allows too much discretion in the criteria for denial. Rather, the entire statutory scheme for obtaining a license and for seeking judicial review from its denial is fraught with the possibility for more indirect, but no less effective, forms of censorship, such as censorship by delay or by the harrassing effect of unduly onerous procedures for exhaustion of the license application process. Only by adhering to this strict standard of scrutiny for *all* licensing

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15 *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Saia v. People of State of New York*, 334 U.S. 558 (1948); *Kunz v. People of State of New York*, 340 U.S. 290 (1951); *Lovell v. Griffin, supra;* and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

laws affecting First Amendment activity can the courts be faithful to the concern of the Framers, who, as articulated in *Lovell, supra*, expressed an intense hostility to any prior licensing of First Amendment activity due to its inherent potential for censorship.

Finally, nothing in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), remotely suggested that a *licensing* ordinance (even for an adult business) could ever be analyzed as a time, place or manner regulation. Unlike the situation in *Renton*, which involved a regulation of the *place* where speech activities could be conducted, a license requirement is an absolute prerequisite to engage in that speech at any place, at any time, or in any manner whatsoever. The danger to First Amendment freedoms if any licensing law is to be analyzed under the deferential standard of review of time, place and manner restrictions is sufficiently great to compel this Court's review.

C. The Court of Appeals' Conclusion that None of the Procedural Safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965) Apply to a Law Requiring a License to Operate an Adult Entertainment Business Conflicts With the Opinions of Other Federal Courts of Appeals and State Courts of Last Resort and Involves a Federal Question of Nationwide Importance Which Should Be Decided by This Court.

After concluding that the deferential standard of review reserved for time, place and manner regulations was the appropriate standard for testing the constitutionality of the

Dallas licensing law, the Court of Appeals then rejected the notion that the law should contain the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965). The Court reasoned that procedural safeguards "are less important when a regulation restricts the conduct of an ongoing commercial enterprise" because "[t]he ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions, even if that review is not given immediately." App. A-9-10.[16]

It is no secret that the content of the materials sold or exhibited by adult entertainment businesses makes them an extremely likely target for whatever form of censorship local authorities believe they can impose without violating civil rights laws. There could hardly be a type of business more needy of *Freedman's* procedural safeguards than adult entertainment businesses. One's willingness or ability to litigate a permit denial is of little use where licensing officials can endlessly delay rendering any final, judicially reviewable decision on a license application. Frankly, an adult entertainment business is

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16 Judge Thornberry, in dissent, pointed out the flaw in the majority's reasoning: "The majority is arguing that the more severe the infringement on a person's First Amendment rights, the less protection that person deserves. Such an argument seems to me to defy common sense. A government cannot avoid the constitutional procedures that safeguard an individual's rights merely by smothering rights to such an extent that the individual is taunted into fighting back. This dangerous reasoning, which can only serve to encourage governments to impose the strongest possible burden on what they deem to be unacceptable speech, contravenes the precepts of the First Amendment." App. A-25.

precisely the very type of businesses *most* likely to be subjected to this type of censorial delay.

Although this Court has subsequently applied *Freedman's* procedural safeguards in numerous contexts other than a direct administrative censorship scheme,[17] it has not yet directly addressed whether, and the extent to which, *Freedman*'s safeguards should apply to a law requiring a license to operate a commercial enterprise engaged in communicative activity. However, many lower court opinions, including federal courts of appeals and state courts of last resort, have concluded that some or all of *Freedman*'s procedural safeguards do apply to this type of licensing requirement.[18]

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17 *See, e.g., Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981) (affirming without opinion judgment of court of appeals striking down Washington's moral nuisance statute because of its failure to provide procedural safeguards of *Freedman*); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (holding *Freedman*'s procedural safeguards applicable to a judicial prior restraint imposed by the issuance of a preliminary injunction of indefinite duration against the exhibition of allegedly obscene materials); *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (holding *Freedman*'s procedural requirements applicable to an application by a theatrical production company for use of municipal concert hall); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (holding *Freedman*'s procedural requirements applicable to seizures of allegedly obscene photographs by customs officials); and *Blount v. Rizzi*, 400 U.S. 410 (1971) (holding *Freedman*'s safeguards applicable to seizures of allegedly obscene materials by postal authorities).

18 The following courts of appeals have recognized the applicability of *Freedman*'s procedural safeguards to laws requiring a license to operate one of more types or adult entertainment businesses: *754 Orange Ave., Inc. v. City of West Haven*, 761 F.2d 105, 114 (2d Cir. 1985) (striking down a law requiring a police permit for coin-operated viewing machines because, *inter alia*, it failed to comply with *Freedman*'s requirement of a statutory procedure for prompt judicial review of a permit denial); *414 Theatre Corp.*

For all the reasons above, this Court should resolve the extremely important question of whether, and to what extent, the procedural safeguards of *Freedman v. Maryland* should apply to a law requiring a business license as a prerequisite to the operation of an adult entertainment business.

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v. Murphy, 499 F.2d 1155, 1159 (2d Cir. 1984) (holding, *inter alia*, that *Freedman*'s procedural requirements are fully applicable to a law requiring an adult bookstore to have a license to maintain coin-operated film machines); *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 505-06 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1980) (holding that failure to comply with *Freedman*'s strict procedural requirements necessitated the invalidation of an ordinance providing for the revocation or suspension of a movie theater's license); and *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1060 (9th Cir. 1986) (holding that a licensing law for erotic dancers was unconstitutional to the extent that the county failed to demonstrate a need for the ordinance's five-day delay between the filing of an application and the granting of a license).

Similarly, a number of state courts and federal district courts have held *Freedman*'s procedural safeguards are applicable to licensing laws directed against adult entertainment businesses. *See, e.g.: Little v. City of Greenfield*, 575 F. Supp. 656, 664 (E.D. Wis. 1983) (holding *Freedman*'s procedural requirements applicable to law requiring special use permit to operate a restaurant or tavern featuring nude dancing); *Wendling v. City of Duluth*, 495 F. Supp. 1380, 1386-87 (D. Minn. 1980) (holding *Freedman*'s procedural requirements fully applicable to law requiring license to operate adult bookstore); *15192 Thirteen Mile Road, Inc. v. City of Warren*, 626 F. Supp. 803, 821 (E.D. Mich. 1985) (finding unconstitutional a conditional use permit provision which required submission of a site plan application because "[t]he lack of time limits governing the Commission and Board of Zoning Appeals' decision raised the possibility that these boards could effectively exclude such adult entertainment facilities from Warren altogether"); *McKinney v. City of Birmingham*, 291 So.2d 761 (Ala. 1974), *cert. denied*, 420 U.S. 950 (1975) (reversing a conviction for operating a theater without a business license, finding that the licensing law failed to contain the requisite procedural safeguards of *Freedman*); *Burton v. Municipal Court*, 441 P.2d 281 (Cal. 1968) (holding, as one of many grounds for striking down a motion picture theater licensing ordinance, that it failed to comply "with the procedural requirements for prior censorship set forth in *Freedman*"), and *Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982, 988 (Colo. 1981) (holding that a temporary zoning moratorium on the presentation of live nude entertainment was an impermissible prior restraint lacking the procedural safeguards of *Freedman*).

II

THE DECISION OF THE COURT OF APPEALS ALLOWING A MUNICIPALITY TO USE A TIME, PLACE AND MANNER ANALYSIS ON A ZONING ORDINANCE WHICH IS BEING APPLIED RETROACTIVELY TO CLOSE AN ENTIRE CLASS OF BUSINESSES, IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *SCHAD V. BOROUGH OF MOUNT EPHRAIM*, 450 U.S. 61 (1981), AND WITH A DECISION OF ANOTHER COURT OF APPEALS.

A. The Court Should DetermineWhether the Strict Scrutiny Standard of Review, Mandated by *Schad* in Zoning Cases Involving Substantial First Amendment Restrictions, Has Been Abandoned.

The Court of Appeals applied the deferential standard of review from *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) in determining the constitutionality of the Dallas zoning provisions. The court stated that any zoning ordinance applied to sexually oriented businesses need only be a reasonable time, place and manner regulation. The Court did not discuss this Court's statement in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) that:

> . . . the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.

Apparently, the Court of Appeals concluded that this Court, in deciding *Renton*, has abandoned *Schad*, even though the court gave no indication in its *Renton* decision that this is so.

That conclusion is unwarranted by any statement in *Renton*. In that case, the Renton ordinance did not affect any existing adult businesses -- *because there were none*. Further, the land area left legally available in *Renton* was sufficient to accommodate over 400 such businesses, which (based on the size and population of that community) certainly provided a "myriad"[19] of locations for adult theaters. Where the *Renton* ordinance was found to have imposed no significant restriction on adult theaters, the Dallas ordinance forces the closure of 92% of that city's adult businesses.

The Court of Appeals' decision cannot be supported by any statement in *Renton*, and is in direct conflict with the prior statement of this Court in *Schad*. In that case,the Court required that a zoning ordinance, which excluded a broad category of protected expression from the community, must be narrowly drawn and must further a sufficiently substantial governmental interest. 452 U.S. at 68. The Court scrutinized the evidence presented by the Borough, and concluded that the Borough "ha[d] not adequately justified its substantial restriction of protected activity." *Id.* at 72.

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19 See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, n. 35 (1976).

The Dallas zoning ordinance will drastically reduce the number of adult cabarets operating in the city, if it does not eliminate them altogether. *See* nn. 8 and 11, *supra*. Apparently because the city has left slightly more than 8% of its land area available for adult businesses, the District Court concluded that the number of adult businesses will not be significantly affected. Neither the District Court nor the Court of Appeals took into account the impact of the ordinance on the adult cabarets, every one of which will be forced to close.

Yet, as this Court observed in *Schad:*

> Even where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression. See *United States v. O'Brien,* 391 U.S. 367, 376-377 (1968).

Id. at 68, n.7.

Therefore, this Court should grant review in this case, to state that *Schad* has not been abandoned, and that any ordinance with a significant impact on freedom of expression be subjected to strict scrutiny. Otherwise, as Justice O'Connor wrote in *Arcara v. Cloud Books, Inc.*, 477 U.S. ____, ____, 106 S.Ct. 3172, 3178 (1986) (O'CONNOR, J., with STEVENS, J., concurring):

> . . . If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review.

B. The Decision Allowing a City to Close Lawfully Operating Pre-existing Businesses has Created a Direct Conflict Between Two United States Courts of Appeals.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976), the plurality opinion noted with approval the finding of the trial court that ". . . the Ordinances do not affect the operation of existing establishments but only the location of new ones." The Ninth Circuit observed, in *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348, 1351 (9th Cir. 1985), that:

> . . . There are apparently no appellate cases since *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), which have upheld the constitutionality of an ordinance which requires the relocation of existing adult-type businesses.

In 1986, following this Court's decision in *Renton*, this Court remanded another case to the Ninth Circuit for further consideration in light of the *Renton* opinion. On remand, the Court of Appeals, in *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1336 (9th Cir. 1987), made the following observation:

> . . . The City of Whittier ordinance is similar to the *American Mini Theatres* ordinance with one exception: the City of Whittier ordinance would close an existing business. The zoning ordinance in *American Mini Theatres* applied prospectively only and prescribed where adult theatres could be opened . . . it did not force existing adult theaters to close. 427 U.S. at 52-55 . . . [T]here is little doubt that a majority [of the Supreme Court] would have questioned an ordinance putting existing theaters out of business.

Thus, the decision in the instant case creates a direct conflict between two circuits which this Court should resolve.

C. The Decision of the Court of Appeals Will Encourage Cities Across the United States to Close Thousands of Adult Businesses Without Any Evidence That Those Businesses Are Causing Adverse Secondary Effects in Their Communities.

The City of Dallas has now received approval from the Court of Appeals of their process to force the closure of every adult cabaret in the city, relying not on any evidence that the cabarets had caused any adverse secondary effects, but relying on a study from Austin, Texas which showed that some adult cabarets in that city were located in high crime areas. The message from the Court of Appeals' opinion is, unfortunately, that a city need not fear close scrutiny of an ordinance closing pre-existing adult businesses. A city can now expect that if it can find any study anywhere that some other city might have

had problems with one type of adult businesses, it can enact a zoning ordinance to close *all* of its adult businesses.

The chilling effect on freedom of expression is tremendous. A prospective operator of an adult cabaret would know that he could expend hundreds of thousands of dollars to open a new business, operate that business in total compliance with every law, cause or contribute to absolutely no deleterious effects whatsoever, and see his business wiped out by a subsequently enacted ordinance based on the "Austin study" and the opinion of the Court of Appeals in this case.

This Court, which has so zealously protected the rights of the minority and the unpopular to free expression for so many years cannot allow this wholesale rewriting of the law. If, indeed, local governments are not to be given such broad and practically unlimited authority to close the doors of adult businesses, that statement of the prevailing law must come from this Court.

D. This Court Should Require That When a City Attempts to Close a Lawfully Operating Pre-existing Business, the City Must Demonstrate that the Business is Causing, or Contributing to, Adverse Secondary Effects.

At the time Chapter 41A was enacted, there were 29 adult cabarets in the City of Dallas. The record before the City Plan Commission and the City Council contained not one word that any of these businesses had ever caused, or even contributed to, any adverse secondary effects in the

community.[20] Nevertheless, they were included in the ordinance, and the effect of the zoning and distance restrictions is to mandate the closure of every one of them on or before June 18, 1989.[21]

Thus, the decision below upholding the zoning provisions of the Dallas ordinance stands for two very dangerous propositions: (1) a city can close all adult businesses if it finds some evidence that one type of business may cause adverse secondary effects; and (2) a city can close lawfully operating adult businesses, causing no adverse secondary effects, if it can find a study somewhere in the United States where another city had problems with adult businesses.[22]

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20 The cabarets introduced considerable evidence in the district court that they had caused no adverse secondary effects. The City introduced no evidence to the contrary, choosing to rely on the Austin study. The trial court found this reliance appropriate.

21 As of the date of filing this Petition, the number of adult cabarets has decreased from 29 to 19. Significantly, not one new adult cabaret has opened in the city.

22 Consider the following actual, and illogical, situation: The City of Boynton Beach, Florida examined police calls to its two topless bars in all of 1987, and compared the number with police calls to the city's "non-topless" bars. The statistics revealed that the topless bars had far fewer calls than the other clubs.

Now, ironically, Boynton Beach is faced with this rather bizarre problem. It can relocate its two topless bars, which are causing far fewer problems, into high-crime, industrial, poorly lit, unsafe areas (assuming there are such areas in the city) and rely on the Court of Appeals' opinion in this case as its authority. However, because Florida law requires a nuisance abatement procedure to close the other establishments -- the ones generating most of the police calls -- the city can do very little with them.

Therefore, this Court should grant review to determine if a pre-existing business presenting protected expression can be summarily closed by retroactive legislation, even when that business causes no adverse secondary effects in the community.

DATED June 13, 1988

Respectfully submitted

Richard L. Wilson
Attorney for Petitioners

applicant or applicant's spouse is presently fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction:

(1) the extent and nature of his past criminal activity;

(2) his age at the time of the commission of the crime;

(3) the amount of time that has elapsed since his last criminal activity;

(4) his conduct and work activity prior to and following the criminal activity;

(5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and

(6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.

(d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under Subsection (c) of this section.

(c) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time. (Ord. 19196)

SEC. 41A-6. FEES.

(a) The annual fee for a sexually oriented business license is $500.

(b) If an applicant is required by this code to also obtain a dance hall license or public house of amusement license for the business at a single location, payment of the fee for the sexually oriented business license exempts the applicant from payment of the fees for the dance hall or public house of amusement licenses. (Ord. 19196)

SEC. 41A-7. INSPECTION.

(a) An applicant or licensee shall permit representatives of the police department, health department, fire department, housing and neighborhood services department, and building inspection division to inspect the premises of a sexually oriented business for the purpose of insuring

comp[illegible]ce with the law, at any time it is occupied or open for business.

(b) A person who operates a sexually oriented business or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the police department at any time it is occupied or open for business. (Ord. 19196)

SEC. 41A-8. EXPIRATION OF LICENSE.

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 41A-4. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.

(b) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 19196)

SEC. 41A-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of a licensee has:

(1) violated or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, or 41A-20 of this chapter;

(2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;

(3) refused to allow an inspection of the sexually oriented business premises as authorized by this chapter;

(4) knowingly permitted gambling by any person on the sexually oriented business premises;

(5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers. (Ord. 19196)

SEC. 41A-10. REVOCATION.

(a) The chief of police shall revoke a license if a cause of suspension in Section 41A-9 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee gave false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(3) a licensee or an employee has knowingly allowed prostitution on the premises;

(4) a licensee or an employee knowingly operated the sexually oriented business during a period of time when the licensee's license was suspended;

(5) a licensee has been convicted of an offense listed in Section 41A-5(a)(10)(A) for which the time period required in Section 41A-5(a)(10)(B) has not elapsed;

(6) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 41A-5(10(A), for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed;

(7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in or on the licensed premises. The term "sexual contact" shall have the same meaning as it is defined in Section 21.01, Texas Penal Code; or

(8) a licensee is delinquent in payment to the city for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.

(c) The fact that a conviction is being appealed shall have no effect on the revocation of the license.

(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license.

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed since the termination of any sentence, parole, or probation. (Ord. 19196)

SEC. 41A-11. APPEAL.

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved

party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. If within a 10 day period the chief of police suspends, revokes, or denies issuance of a dance hall license or public house of amusement license for the same location involved in the chief's action on the sexually oriented business license, then the chief may consolidate the requests for appeals of those actions into one appeal. (Ord. 19196)

SEC. 41A-12. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application. (Ord. 19196)

SEC. 41A-13. LOCATION OF SEXUALLY ORIENTED BUSINESSES.

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

(1) a church;

(2) a public or private elementary or secondary school;

(3) a boundary of a residential district as defined by the Dallas Development Code;

(4) a public park adjacent to a residential district as defined by the Dallas Development Code; or

(5) the property line of a lot devoted to residential use.

(b) A person commits an offense if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,000 feet of another sexually oriented business.

(c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(d) For the purposes of Subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary

or secondary school, or to the nearest boundary of an affected public public park, residential district, or residential lot.

(e) For purposes of Subsection (b) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(f) Any sexually oriented business lawfully operating on June 18, 1986, that is in violation of Subsections (a), (b), or (c) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed three years, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church, public or private elementary or secondary school, public park, residential

district, or residential lot within 1,000 feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or has been revoked. (Ord. 19196)

SEC. 41A-14. EXEMPTION FROM LOCATION RESTRICTIONS.

(a) If the chief of police denies the issuance of a license to an applicant because the location of the sexually oriented business establishment is in violation of Section 41A-13 of this chapter, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the city secretary a written request for an exemption from the locational restrictions of Section 41A-13.

(b) If the written request is filed with the city secretary within the 10-day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this code, shall consider the request. The city secretary shall set a date for the hearing within 60 days from the date the written request is received.

(c) A hearing by the board may proceed if at least two of the board members are present. The board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.

(d) The permit and license appeal board may, in its discretion, grant an exemption from the locational restrictions of Section 41A-13 if it makes the following findings:

(1) that the location of the proposed sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public safety or welfare;

(2) that the granting of the exemption will not violate the spirit and intent of this chapter of the city code;

(3) that the location of the proposed sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;

(4) that the location of an additional sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of urban renewal or restoration; and

(5) that all other applicable provisions of this chapter will be observed.

(e) The board shall grant or deny the exemption by a majority vote. Failure to reach a majority vote shall result in denial of the exemption. Disputes of fact shall be decided on the basis of a preponderance of the evidence. The decision of the permit and license appeal board is final.

(f) If the board grants the exemption, the exemption is valid for one year from the date of the board's action. Upon the expiration of an exemption, the sexually

oriented business is in violation of the locational restrictions of Section 41A-13 until the applicant applies for and received another exemption.

(g) If the board denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the board's action.

(h) The grant of an exemption does not exempt the applicant from any other provisions of this chapter other than the locational restrictions of Section 41A-13. (Ord. 19196)

SEC. 41A-15. ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.

(a) A nude model studio shall not employ any person under the age of 18 years.

(b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

(c) A person commits an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio premises which can be viewed from the public right of way.

(d) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that

a sofa may be placed in a reception room open to the public. (Ord. 19196)

SEC. 41A-17. ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.

(a) The requirements and provisions of Chapter 46 of this code remain applicable to adult theaters and adult motion picture theaters.

(b) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(c) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(d) It is a defense to prosecution under Subsections (b) and (c) of this section if the person under 18 years was in a restroom not open to public view or persons of the opposite sex. (Ord. 19196)

SEC. 41A-18. ADDITIONAL REGULATIONS FOR ADULT MOTELS.

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and vacated two or more times in a period of time that is less than

10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

(b) A person commits an offense if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.

(c) For purposes of Subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration. (Ord. 19196)

SEC. 41A 19. REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereot specifying the location of one or more manager's stations and the location of

all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed 32 square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The chief of police may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

(2) The application shall be sworn to be true and correct by the applicant.

(3) No alteration in the configuration or location of a manger's station may be made without the prior approval of the chief of police or his designee.

(4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

(5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(6) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in Subsection (5) remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to Subsection (1) of this section.

(7) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) footcandle as measured at the floor level.

(8) It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above, is maintained at all times that any patron is present in the premises.

(b) A person having a duty under Subsections (1) through (8) of Subsection (a) above commits an offense if he knowingly fails to fulfill that duty. (Ord. 19196)

SEC. 41A-20. DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.

(a) A person commits an offense if, in a business establishment open to persons under the age of 17 years, he displays a book, pamphlet, newspaper, magazine, film or video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain or to exploit sexual lust or perversion for commercial gain, any of the following:

(1) human sexual intercourse, masturbation, or sodomy;

(2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;

(3) less than completely and opaquely covered human genitals, buttocks, or that portion of the female breast below the top of the areola; or

(4) human male genitals in a discernibly turgid state, whether covered or uncovered.

(b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:

(1) it is available to the general public for handling and inspection; or

(2) the cover or outside packaging on the item is visible to members of the general public. (Ord. 19196)

SEC. 41A-21. ENFORCEMENT.

(a) Except as provided by Subsection (b), any person violating Section 41A-13 of this chapter, upon conviction, is punishable by a fine not to exceed $1,000.

(b) If the sexually oriented business involved is a nude model studio or sexual encounter center, then violation of Section 41A-4(a) or 41A-13 of this chapter is punishable as a Class B misdemeanor.

(c) Except as provided by Subsection (b), any person violating a provision of this chapter other than Section 41a-13, upon conviction, is punishable by a fine not to exceed $200.

(d) It is a defense to prosecution under Section 41A-4(a), 41A-13, or 41A-16(d) that a person appearing in a state of nudity did so in a modeling class operated:

(1) by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;

(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or

(3) in a structure:

(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

(B) where in order to participate in a class a student must enroll at least three days in advance of the class; and

(C) where no more than one nude model is on the premises at any one time.

(e) It is a defense to prosecution under Section 41A-4(a) or Section 41A-13 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value. (Ord. 19196)

SEC. 41A-22. INJUNCTION.

A person who operates or causes to be operated a sexually oriented business without a valid license or in violation of Section 41A-13 of this chapter is subject to a suit

for injunction as well as prosecution for criminal violations. (Ord. 19196)

SEC. 41A-23. AMENDMENT OF THIS CHAPTER.

Sections 41A-13 and 41A-14 of this chapter may be amended only after compliance with the procedure required to amend a zoning ordinance. Other sections of this chapter may be amended by vote of the city council. (Ord. 19196)

8343H

APPENDIX C

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-1723

FW/PBS, INC., ETC., et al.,

Plaintiffs-Appellants,

versus

THE CITY OF DALLAS, ETC., et al.,

Defendants-Appellees.

JOHN RANDALL DUMAS d/b/a GENO'S,

Plaintiff,

TEMPO TAMERS, INC., ETC., et al.,

Plaintiffs-Appellants,

versus

CITY OF DALLAS, ETC.,

Defendant-Appellee.

CALVIN BERRY, III, et al.,

Plaintiffs-Appellants,

versus

CITY OF DALLAS, ETC., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 2/12/88, 5 Cir., 1988, _____ F.2d ____)

(March 14, 1988)

Before THORNBERRY, GARWOOD and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. Judge Thornberry would grant rehearing for the reasons expressed in his dissent to the majority opinion. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

APPENDIX D

In The

Supreme Court Of The United States

ORDER LIST

WEDNESDAY, MAY 4, 1988

ORDER IN PENDING CASE

A-800 **FW/PBS, INC. DBA PARIS ADULT BOOKSTORE II, ET AL. V. CITY OF DALLAS, ET AL.**

The application for stay filed with Justice White has been referred to the Court. Justice White's temporary stay is hereby vacated. The application for stay is granted and the judgment of the United States Court of Appeals for the Fifth Circuit is stayed except for its holding that the provisions of the ordinance regulating the location of sexually-oriented businesses do not violate the Federal Constitution pending the timely filing and disposition of a petition for a

writ of certiorari. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue in effect pending the sending down of the judgment of this Court.

Supreme Court, U.S.
FILED
JUN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-2051

No. _____

In The

Supreme Court of the United States

October Term, 1987

M.J.R., INC., et al.,
Petitioners,

v.

CITY OF DALLAS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-1723

FW/PBS, INC., ETC., et al.,

Plaintiffs-Appellants,

versus

THE CITY OF DALLAS, ETC., et al.,

Defendants-Appellees.

O

JOHN RANDALL DUMAS d/b/a GENO'S,

Plaintiff,

TEMPO TAMERS, INC., ETC., et al.,

Plaintiffs-Appellants,

versus

CITY OF DALLAS, ETC.,

Defendant-Appellee.

O

CALVIN BERRY, III, et al.,

Plaintiffs-Appellants,

versus

CITY OF DALLAS, ETC., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

(February 12, 1988)

Before THORNBERRY, GARWOOD and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

In the early summer of 1986, the City of Dallas, Texas began to consider the regulation of the effects of sexually oriented businesses upon the community. After study of similar efforts by other metropolitan cities, the City Council passed a detailed ordinance that imposed licensing and zoning restrictions upon sexually oriented businesses. A variety of businesses that would be subject to its regulations attacked the Ordinance in three separate federal suits. Each of the three suits asked the district court to enjoin enforcement of the Ordinance and declare it unconstitutional. The suits were consolidated and the case was submitted for decision on motions for summary judgment filed by all parties. The district court, with exceptions not complained of here, upheld the Ordinance in a detailed written opinion. [1]

These plaintiffs appeal urging that the district court erred in two main regards. First, plaintiffs allege that the licensing provisions are content-based regulations, a prior restraint upon activity protected by the first amendment, and invalid because they lack the required procedural protections for such regulation. Second, plaintiffs complain that the court was wrong to conclude that reasonable alternative locations are available for existing businesses forced to move by the Ordinance, an inadequacy that denied their rights under the first and fourteenth amendments. Plaintiffs also make more specific attacks to the Ordinance. They urge that the licensing scheme is

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1 *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986).

unconstitutional because it fails to limit the discretion of the Chief of Police, the licensing official, and because it disqualifies persons based on their criminal record.

We are not persuaded that the district court erred in its rejection of the constitutional attack and affirm. Other and more narrow attacks upon specific provisions of this ordinance were also made. We will explain these contentions and our reasons for affirming their rejection in due course.

I

The Ordinance subjects sexually oriented businesses to zoning and licensing requirements. A business must be at least 1000 feet from another sexually oriented business or a church, school, residential area, or park. Such businesses must also obtain a license issued by the Chief of Police and permit inspection of their premises when open or occupied. A license is not available to persons formerly convicted of specified crimes, such as promotion of prostitution. The ordinance also requires that viewing rooms in adult theatres be configured to allow visual surveillance by management.

The ordinance recites that its purpose is to promote health, safety and morals, and to prevent the "continued concentration of sexually oriented businesses." It disclaims any purpose to deny "access by adults to sexually oriented materials protected by the First Amendment."

The city attorney first presented the Ordinance to the Dallas City Plan Commission. The Plan Commission heard testimony from supporters as well as opponents of the Ordinance. The Commission considered studies of other cities regarding the relationship among concentrations of sexually oriented business, crime and property values, but did not conduct studies of Dallas itself. The Plan Commission did, however, consider a study of alternative locations within Dallas for the affected businesses. On the basis of its findings, the Plan Commission unanimously recommended that the City Council adopt the Ordinance.

The Council unanimously adopted the Ordinance after making a number of findings. It considered the same studies as well as a study conducted by the Dallas Police Department that concluded that crime rates are 90% higher in adult districts. The Council concluded that public health and safety required regulation of these businesses because they "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature"; that there have been a susbstantial number of arrests for sex-related crimes near these businesses; and that the evidence that these businesses are associated with "urban blight" and declining property values is well documented.

II

We first examine the district court's exercise of jurisdiction and the standing of the plaintiffs. Seven of the nine types of sexually oriented businesses regulated by the Ordinance are represented by at least one plaintiff. These plaintiffs include adult arcades, adult bookstores, adult video stores, adult cabarets, adult motels, adult motion picture theaters, and nude model studios. Only escort agencies and sexual encounter centers are not before the court and we do not decide the constitutionality of the Ordinance as it applies to them. Nor do we decide whether the Ordinance may constitutionally reach businesses that sell sexually-oriented reading materials or videos solely for use off the business' premises. Each of the book and video stores before us also offered on-premises consumption of sexually oriented materials.

There is no question but that this is a genuine and not a hypothetical controversy. The plaintiffs are subject to the terms of the Ordinance and obedience to its terms will limit business in ways that will result in economic loss as well as a loss of freedom to engage in acts that enjoy some measure of protection under the first amendment.

We also are not persuaded that there is a basis for abstention. There were no pending state proceedings, none have been instituted, and we are not pointed to any possible

construction of the Ordinance by state courts that might make imprudent our exercise of jurisdiction.

III

Plaintiffs contend that the licensing scheme must fail for several related reasons. First, they argue that insisting on a license for sexually oriented businesses regulates the content of expression protected by the first amendment without the procedural protections of *Freedman v. Maryland*,[2] and *Fernandes v. Limmer*.[3] The ordinance is said to suffer three procedural deficiencies: it places the burden of proof upon the licensee to prove that a license was wrongfully denied; it fails to provide for prompt determination of the appeal; and it fails to provide assurance of a "prompt final judicial determination."

We are not persuaded that this ordinance requires such procedural safeguards for its validity. The argument assumes that the Ordinance licensing scheme regulates protected activity in a way that triggers the procedural requirement of *Freedman*. The ultimate issue in *Freedman* was the constitutionality of Maryland's motion picture statute. Maryland made it unlawful to distribute or exhibit films unapproved by a Board of Censors. Maryland did not provide for judicial participation or

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2 380 U.S. 51 (1965).

3 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982).

otherwise assure prompt review in its procedure although its board could bar the showing of a film. The court held that this prior restraint can avoid constitutional infirmity only if hedged by procedural safeguards designed to obviate the dangers of a censorship system. The court concluded that these safeguards include the state's shouldering of the burden of persuasion, a "procedure requiring a judicial determination . . . ," and restriction of prior restraint to the shortest fixed period compatible with sound judicial resolution.[4]

We applied *Freedman* in *Fernandes* to strike down a regulation of the Dallas-Fort Worth Airport Authority denying followers of the Krishna religion a license to solicit at the airport. We rejected the suggestion that the regulation was sufficiently content-neutral to escape the procedural requirements of *Freedman*: "Although D/FW's regulatory ordinance purports to be content-neutral, the consequences flowing from a permit denial here are essentially the same as those addressed in *Freedman*: to an unsuccessful permit applicant, the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights."[5]

A license from the airport authority was necessary in order to solicit for religious purposes in a public forum. There was no finding that the restraint of protected first amendment activity was narrowly tailored to the regulation of any untoward

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4 *Id.* at 58-59.

5 663 F.2d at 628.

consequences and no findings that the protected conduct had consequences regulable by the state under its police power. Stated more directly, the airport authority was seen as controlling a religious group's access to a public forum without justification. We concluded that *Freedman's* protections were required but absent.

In *Fernandes* we did not apply the time, place and manner analysis of *Young v. American Mini Theatres, Inc.*[6] There the Supreme Court faced a zoning scheme similar to the Dallas Ordinance. It prohibited locating an adult theatre within 1,000 feet of any two other 'regulated uses' or within 500 feet of any residential zone. Although a majority of the Justices voted to uphold the regulation, five could not agree on a single rationale.

Four years after our decision in *Fernandes*, however, a majority of the Supreme Court settled on a time, place and manner rationale for zoning an activity that is sexually oriented but not obscene. In *City of Renton v. Playtime Theatres, Inc.*[7] the Court reviewed a zoning ordinance enacted by Renton, Washington that prohibited adult motion picture theatres from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school.[8] Characterizing the *City of Renton* ordinance as a time, place or

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6 427 U.S. 50 (1976).

7 106 S.Ct. 925.

8 *Id.* at 925-27.

manner restriction, the Court found the first amendment satisfied because the city had a substantial interest in regulating sexually oriented businesses and did so without restricting alternative avenues of communication.[9]

We applied *City of Renton* to a licensing scheme substantially similar to the Dallas Ordinance in *SDJ, Inc. v. City of Houston.*[10] On the basis of *City of Renton*, we upheld the Houston ordinance against a facial first amendment challenge. The opponents of the Ordinance, however, made no attack to the procedural protections in the Ordinance. Nevertheless, the *City of Renton* and *City of Houston* decisions guide our analysis of the procedural protections the City of Dallas must provide here.

Most important, these decisions recognize that a city may regulate the effects of sexually oriented businesses without engaging in content-based regulation. The *City of Renton* Court found no reason to apply rigorous content-based analysis where a city's "predominant concern" is to control the negative effects of a certain kind of business rather than to suppress a certain type of speech.[11] In addition, the court held that sexua'ly explicit materials deserve less first amendment protection than other kinds of speech.[12] In short, to the extent

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9 *Id.* at 930-32

10 Slip op. No. 86-2735 (5th Cir. Feb. 10, 1988).

11 *City of Renton*, 106 S.Ct. at 930.

12 *Id.* at 929-30 n.2.

that *Fenandes* reaches Dallas' present zoning regulation, it is limited by the *City of Renton* decision; the first amendment protection required for religious activity, including proselytizing and solicitation of money, is of a different order than the protection due sexually oriented businesses.

We find that the Dallas Ordinance, like the Ordinance before the Court in *Renton*, regulates only the secondary effects of sexually oriented businesses. For this reason, the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content.

This is not to say that the lower level of protection provided in *City of Renton* inevitably excludes the procedures required by *Fernandes* In this case, however, those procedures were not necessary insofar as the Dallas Ordinance regulates a *business* engaged in an activity subject only to the lesser protection. *Fernandes* procedures are less important then a regulation restricts the conduct of an ongoing commercial enterprise. What is being limited here is not a particular movie–as in *Freedman*–nor episodic solicitation efforts–as in *Fernandes*–but a long-term commercial business. The ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions, even if that

review is not given immediately.[13] We do not decide today whether *Fernandes* procedures apply to lesser-protected activities conducted outside the realm of an ongoing commercial enterprise.

We are also satisfied that the Ordinance is valid on its face. Because the Ordinance in City of Renton was a content-neutral time, place or manner restriction, the Supreme Court required only that it be "designed to serve a substantial government interest" and allow for "reasonable alternative avenues of communication."[14] The Dallas Ordinance meets both those requirements. Like the *City of Renton* ordinance, the Dallas law was designed to serve the City's interest in maintaining "the quality of urban life."[15] The City Council's consideration of the criminal effects of concentrated sexually-oriented businesses was thorough, as was its review of the effects such concentrations have on property values. In short, Dallas has demonstrated that the Ordinance furthers a substantial government interest.

The Ordinance also allows reasonable alternative avenues of communication. In *Basiardanes v. City of Galveston*,[16] we held that an ordinance restricting adult theatres to locations that

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13 *Cf. Freedman* 380 U.S. at 59 (noting that "[t]he exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation").

14 *City of Renton*, 106 S.Ct. at 930.

15 *Id.* at 930.

16 682 F.2d 1203, 1214 (5th Cir. 1982).

were "poorly lit, barren of structures suitable for showing films, and perhaps unsafe," did not provide adequate alternative locations. Here, however, the City offered evidence that convinced the district court that the alternative sites are feasible locations and not just open areas on a city map. Putting aside the question of the deference the district court owed the findings of the city council regarding alternative locations, it had evidence before it sufficient to sustain its findings. Plaintiffs suggest that such findings are inappropriate for deciding a motion for summary judgment. Perhaps that is so, and we express no opinion in this regard. However, the parties submitted the case for decision on the record and the record supports the district court's findings regarding the number of alternative locations.

IV

We also are not convinced by the other constitutional attacks against the Ordinance's licensing provisions. Appellants rely on several different constitutional provisions in their challenge: they attack three specific license requirements as prior restraints under the first amendment, they contend that the Ordinance's grant of discretion to the police chief violated the first amendment's prohibition on vagueness, and they argue that the Ordinance's inspection-consent provision violates the

fourth amendment's limitations on searches as well as the first amendment. We deal with these attacks in turn.

A

As a threshold matter, we note that the *City of Renton* standard of review applies to the details of the licensing scheme–as opposed to the zoning rules–even though the licensing scheme may regulate aspects of the businesses' operations other than location. The kind of speech affected by the license requirements and the city's justification for enforcing them are the same for both kinds of restrictions. Whether a license is denied because the business is improperly located or because the business is improperly maintained, the effect is the same–the operator must refrain from the activity and his only altenative is to comply with the Ordinance and obtain a license.[17] Indeed, as the very title of the doctrine

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17 Contrary to Judge Thornberry's dissent, *see post* at 9, *Fernandes* did not hold that a licensing scheme may never be used to implement a valid time, place or manner restriction on speech activity. Rather, *Fernandes* held that the delay in judicial review of a license denial itself impermissibly infringed on the applicant's right to speak for the duration of that delay. 663 F.2d at 628. The fact that this delay occurred in the context of licensing was not important to the court's decision. More on point is the pre-*Renton* decision, *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980). There the court upheld a zoning provision scattering adult businesses pursuant to a finding by the City of Peoria that concentrations of such businesses eroded neighborhoods. Notably, *Genusa* accepted the proposition that licensing requirements be treated under the same analysis as zoning. *See id.* at 1212.

suggests, "time, place or manner" analysis cannot be limited solely to regulation of "place."

On this basis we hold, in accordance with the prevailing view, that the first amendment does not prohibit the City of Dallas from requiring that viewing booths in adult theatres be open.[18] Although this requirement is based on slightly different considerations than those that support the zoning requirements, the public purpose involved is no less substantial. The City could reasonably conclude that closed booths encourage illegal and unsanitary sexual activity in adult theatres. The substantial government interest in curbing such effects supports the open booth requirement as a valid restriction under *City of Renton* standards.

The owners of adult motels make a separate challenge to the Ordinance provision prohibiting rental of a motel room for less than ten hours at a time. The motel owners allege that the City made no finding that adult motels engender the same effects on property values and crime as do other sexually oriented businesses. Once again, however, we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned.

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18 *See Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir. 1986); *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1246 (9th Cir. 1982).

Appellants also attack the Ordinance provision that denies licenses to persons convicted of certain crimes.[19] Arguably, it is awkward to analyze this occupational disability as a time, place or manner restriction within the City of Renton framework. This part of the Ordinance does not simply regulate the manner of protected activity, it denies the right of persons convicted of certain crimes to engage in the regulated businesses.

Proceeding in categorical terms sheds little light on the standard of review we should apply, although we can imagine three possibilities. First, we might subject the provision to the strict level of review reserved for content-based regulation, and require the city to show that the provision is precisely drawn to serve a compelling interest.[20] Second, we might apply *City of Renton's* approach and require that the provision serve a substantial government interest while leaving open alternative avenues of communication. Finally, although the provision might not be considered content neutral, the fact that it impinges on a lesser-protected category of speech might justify the application of some intermediate standard of review, particularly when the regulation is a form of disability commonly attending convictions.

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19 These included a variety of prostitution offenses; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault; runaway child.

20 *See Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541 (1980).

A strong argument can be made that we need not determine which standard of review is most appropriate because the provision can in any event withstand strict scrutiny; that the city's findings demonstate a compelling interest in limiting the involvement of convicted persons in the operation of sexually oriented businesses; that by documenting the strong relationship between sexually-oriented businesses and sexually related crimes, the city established a compelling justification for barring those prone to such crimes from the management of these businesses. The argument would continue that the city's findings conform with the well-accepted notion that the government may attach to criminal convictions disabilities aimed at preventing recidivism.[21]

While compelling necessity might be a proper standard to measure regulation disabling a person with full participatory rights of citizenship, on balance we are persuaded that only a substantial relationship need be shown between the conviction and the evil sought to be prevented. The courts have not engaged in such strict scrutiny or otherwise required compelling necessity to justify other occupational bars attending a criminal conviction, including those laced with

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21 *Cf. De Veau v. Braisted*, 363 U.S. 144, 158-59 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas."); *106 Forsyth Corp. v. Bishop*, 482 F.2d 280, 281 (5th Cir. 1973) (per curiam) (first amendment permits revocation of theatre license for violation of law against sexually explicit screenings), *cert. denied*, 422 U.S. 1044 (1975).

activity protected by the first amendment such as labor organizing. In short, the City need only show that conviction and the evil to be regulated bear a substantial relationship.

We agree with the district court that the Ordinance is now sufficiently well tailored to achieve its ends. Ineligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses.[22]

In addition, the Ordinance permits licensing of former offenders after enough time has passed to indicate they are no longer criminally inclined, and takes into account the seriousness of applicant's offenses.[23] The relationship between the offense and the evil to be regulated is direct and substantial.

This result also is consistent with our decision in *Fernandes*. The ordinance challenged in *Fernandes* denied a permit to anyone convicted of an offense involving moral turpitude. Yet, in *Fernandes* there was no immediate relationship between crimes of moral turpitude and the purpose of the airport's ordinance.[24]

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22 The district court scrutinized the list of crimes that would make an applicant ineligible for a license and invalidated those it found to have no relationship to the purpose of the Ordinance. These offenses included kidnapping, robbery, bribery, controlled substances violations, and "organized criminal activities." *Dumas*, 648 F. Supp. at 1074.

23 An individual convicted of a specified misdemeanor becomes eligible for a license two years after the conviction or end of confinement, whichever is later; for felonies or multiple misdemeanors the period is five years.

24 *See* 663 F.2d at 630.

B

We also agree with the district court that the Ordinance does not give impermissibly broad discretion to the Chief of Police in issuing, suspending, and revoking licenses. Among other things, the Ordinance empowers the Chief of Police to require "reasonably necessary" information in a license application, to deny a license for failure to comply with "applicable [health, fire and building] laws and ordinances," and to revoke a license if the licensee gave "false or misleading information" in the application or has "knowingly" permitted illegal conduct on the premises.[25]

As these examples demonstrate, the Ordinance relies on standards that are "susceptible of objective measurement" and thus consistent with the first amendment.[26] The factual basis necessary for each of these determinations is either implicitly obvious, as in what constitutes "false" information or information "reasonably necessary" for an application, or

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25 Although the district court left these provisions standing, the court invalidated two sections of the ordinance as unduly discretionary. One provision denied a license to applicants who have been "unable to operate or manage a sexually oriented business in a peaceful and law-abiding manner." The other permitted issuance of a license to applicants who, although previously convicted of a crime, are "presently fit to operate a sexually oriented business." *See Dumas*, 648 F. Supp. at 1072-73. The district court struck these parts from the ordinance, so they are not before us.

26 *See Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1987); *Kunz v. New York*, 340 U.S. 290 (1951).

ascertainable through reference to other sources of law, as in what constitutes a violation of health laws or knowledge of illegal conduct.[27]

C

Finally, plaintiffs attack the Ordinance provision permitting the inspection of a licensed business whenever the premises are occupied or open for business.[28] We reject the argument that this provision violates the fourth amendment prohibition against unreasonable searches. Under the adminstrative search doctrine, searches to enforce regulatory standards may be reasonable in light of the reduced expectation of privacy in a pervasively regulated business.[29]

Communities have long been concerned about the effects of sexually oriented businesses and have attempted to cope with those effects through regulation. Indeed, in light of this history of regulation we rejected a facial fourth amendment attack to an ordinance permitting warrantless searches of licensed massage

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27 *See SDJ, Inc. v. City of Houston, supra* (upholding similar ordinance provision).

28 Judge Thornberry would invalidate the requirement that licensed businesses comply with the city's health, fire and building codes as a restraint of speech unrelated to the city's stated purposes. We do not reach this issue because the Appellants' only stated attack to the code-compliance requirement was that it vested too much discretion in city officials. We have dealt fully with this argument, but we will not consider others not presented to us.

29 *See United States v. Biswell*, 406 U.S. 311, 316 (1972); *Marshall v. Barlow's, Inc.* 436 U.S. 307, 313 (1978).

parlors.[30] We hold that sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable.

Nor do we find the inspection provisions unduly burdensome under the first amendment. The power of the city to inspect for violations does not enhance the Ordinance's suppressive effect, for the city may revoke a license only for non-compliance with substantive provisions we have determined to be consistent with *City of Renton* standards. Rather, the city has a substantial interest in enforcing the Ordinance and the inspection provision is well tailored to serve that interest.

AFFIRMED.

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30 *See Pollard v. Cockrell*, 578 F.2d 1002, 1014 (5th Cir. 1978).

THORNBERRY, Circuit Judge, concurring in part and dissenting in part:

As stated by the majority, this case concerns the limits on the manner in which the City of Dallas may restrict the speech of its citizens in its continuing fight against crime and urban blight. Dallas has chosen, as a means of achieving these laudable goals, a system of licensing and zoning of sexually oriented businesses. Because the activities of many of these businesses implicate First Amendment concerns, it is the duty of this court to closely examine these laws. Because I believe the majority has not applied standards consistent with prior case law in its examination of the ordinance, I respectfully dissent from part of the majority opinion.

I dissent only with respect to those businesses whose activities directly implicate the First Amendment, such as the adult book stores, adult video stores, and adult motion picture theaters. Because no showing has been made that these businesses in any way involve obscenity, they are entitled to First Amendment protection. *See, e.g., Schad v. Borough of Mount Ephraim*, 101 S.Ct. 2176, 2184 n.10 (discussing how *Young v. American Mini Theatres, Inc.*, 96 S.Ct. 2440 (1976) analyzed the impact on the First Amendment of an ordinance zoning adult movie theaters), 101 S.Ct. at 2186 (holding that nonobscene nude dancing is protected by the First Amendment) (1981). I therefore concur with the majority insofar as it

upholds the ordinance as applied to businesses, such as adult motels, whose primary activities are not speech.

I also concur with the majority's result in upholding the zoning provisions of the ordinance. I do wish to clarify that I understand the time, place, and manner doctrine as applying only to restrictions like the zoning provisions of the Dallas ordinance. The time, place, and manner doctrine should not apply to the licensing laws[1] if the denial of a license completely bans the speech of the person denied and does not leave the speaker alternative avenues of communication. *See, e.g., Basiardanes v. Galveston*, 682 F.2d 1203, 1213 (5th Cir. 1982) ("A reasonable time, place, and manner regulation restricts speech but leaves open adequate alternative channels of communication to the speaker.").

I

In *Freedman v. Maryland*, 85 S.Ct. 734 (1965), the Supreme Court required that the state provide certain procedural safeguards before imposing a prior restraint on speech. First, the state must have the burden of instituting judicial proceedings in which it bears the burden of justifying its actions. Second, some system must assure that any interim

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1 The time, place, and manner doctrines generally only apply to regulations of speech in public forums and to zoning regulations. *See generally* 3 R. Rotunda, J. Nowak, & J Young, *Treatise on Constitutional Law: Substance and Procedure* ch. XIII (1986).

restraint imposed pending judicial resolution will be of brief duration. Finally, the state must guarantee swift judicial action. *Id.* at 739. In essence, *Freedman* hold that "no forum except a court can be permitted to impose a valid final restraint on expressional activities. . . . " L. Tribe, *American Constitutional Law* § 12-34 (1978).

The Dallas ordinance does not provide for a court to review license denials in the manner required by *Freedman*.[2] The ordinance places the burden of appealing on the licensee, gives no assurance that the burden placed on one denied a license will be of brief duration, and contains no guarantee of swift judicial action. The denial of a license to engage in speech is, however, the classic prior restraint.[3] Thus, it seems to me, on its face *Freedman* condemns the ordinance.

The majority apparently concludes, however, that *Freedman's* procedural safeguards are not needed because the

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2 Section 41-11 of the ordinance provides for the following procedures if a license is denied, suspended or revoked:
If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action *and the right to appeal. The aggrieved party may appeal* the decision of the chief of police *to a permit and license appeal board* in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision.

3 Indeed, the First Amendment grew out of a struggle in England over a system of licensing the press. *See Near v. Minnesota*, 51 S.Ct. 625, 630 (1930). Although the Dallas ordinance does not apply the content-sensitive methods of the English system, "prior restraint doctrine has been invoked to strike down content-neutral permit systems that regulate protected First Amendment activities." *Fernandes v. Limmer*, 663 F.2d 619, 628 (5th Cir. Unit A 1981).

procedural safeguards, in addition to the substantive provisions, is narrowly tailored to any identified state interest.

In discussing the constitutionality of the absence of the *Freedman* safeguards, the majority does make one argument that deserves special attention. According to the majority, the procedural safeguards are less important when a regulation restricts the conduct of an ongoing commercial enterprise. What is being limited here is not a partcular movie–as in *Freedman*–nor episodic solicitation efforts–as in *Fernandes*–but a long-term commercial business. The ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions, even if that review is not given immediately.

The majority is arguing that the more severe the infringement on a person's First Amendment rights, the less protection that person deserves. A government cannot avoid the constitutional procedures that safeguard an individual's rights merely by smothering the rights to such an extent that the individual is taunted into fighting back. This dangerous reasoning, which can only serve to encourage governments to impose the strongest possible burden on what they deem to be unacceptable speech, contravenes the precepts of the First Amendment.

The majority also attempts to escape *Fernandes* by arguing that the denial of a license to engage in sexually oriented speech need not be narrowly tailored even if the speech is nonobscene

See Fernandes, 663 F.2d at 635. Moreover, *Fernandes* expressly referred to "D/FW's content-neutral permit system." *Id.* at 627. Thus, the majority's conclusion that *Fernandes* did not involve a content-neutral regulation is unwarranted.

The majority also attempts to distinguish *Fernandes* by stating that "[t]here was no finding that the restraint of protected first amendment activity was narrowly tailored to the regulation of any untoward consequences and no findings that the protected conduct had consequences regulable by the state under its police power." But *Fernandes* imposes procedural requirements on even narrowly tailored restraints. The *Fernandes* court found that some of the substantive provisions of the airport ordinance withstood constitutional scrutiny. *Id.* at 629 (denial of permit for false statements in permit application), at 636 (denial of permit for interference with pedestrian traffic). Nevertheless, the court still required that the Airport Board adhere to the procedural safeguards when denying a permit. *Id.* at 628. The majority has not offered any valid justification for the absence of procedural safeguards in the Dallas ordinance. Most of the justifications offered by the majority only relate to the validity of the substantive restrictions the Dallas ordinance places on First Amendment activity. They are irrelevant to the adequacy of the procedural safeguards attending the substantive restrictions–a central concern of *Fernandes*. The majority never argues, and probably cannot argue, that the absence of

930. As Justice Powell elaborated in his concurrence in *Young*, "the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated." *Young*, 96 S.Ct. at 2458 n.6.

It is in this context that the Court allowed a distinction between sexually oriented speech and other speech. The Court was discussing only whether a state could choose to single out sexually oriented speech from other types of speech without violating its threshold obligation of content-neutrality. The Court concluded that such regulations are content-neutral. Because of that conclusion, and because the ordinance in *Renton* was a zoning ordinance that allowed alternative avenues of communication, the Court applied the reasonable time, place, and manner review. But nothing in *Renton* supports the majority's severing of the time, place, and manner standard from its proper context, and applying that standard to this licensing ordinance. This licensing has a far more substantial impact on speech than zoning because zoning leaves open alternative avenues of communication. The denial of a license is a complete ban on speech.

I can conceive of a licensing law that would be analyzed as a time, place, and manner restriction. For instance, if a government, to prevent overcrowding, required a person to get a license to use a park at a certain hour of the day, that would be a regulation of the time at which the person may speak. The

person, however, would still be allowed to speak, although perhaps at a different time than he originally anticipated. The Dallas licensing scheme, however, is a regulation of a different magnitude. It completely prevents certain persons from speaking. It thus does not merely regulate the time, place, or manner is which one may speak, but says one may not speak at all.

Naturally, I agree with the majority that the current regulations are content-neutral. The regulations are justified by concerns unrelated to the suppression of speech. I strongly disagree with the majority, however, on the answer to the ultimate question of the constitutionality of the licensing scheme. I would apply a review stricter than mere reasonableness to content-neutral regulations that have the effect of totally banning certain speech. I cannot believe that the Supreme Court intended that all regulations of sexually oriented speech are somehow to be judged as time, place, and manner restrictions requiring only a review as to their reasonableness. Although the Court in *Renton* was willing to allow a reasonable time, place, and manner regulation that singled out sexually oriented speech, it still required alternative areas for that speech. Surely, however, the Court would more closely examine a regulation of this speech that does not leave any avenue of communication for the speaker.

Applying a time, place, and manner analysis to a licensing statute that completely bans certain classes of persons from

speaking is illogical. Although the majority speaks of deference to the district court's finding that the ordinance allows for reasonable alternative locations for speech, that finding can relate only to the zoning regulations; it cannot relate to this licensing regulation. A person who is completely banned from speech because, for example, he has in the past been convicted of some crime has no other avenue of communication. *Cf. Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172, 3177 n.2 (1986) (distinguishing an order closing an adult book store from an "unconstitutional prior restraint" partly because the party could carry on his bookselling business in other locations). The time at which he may speak, the place where he may speak, and the manner in which he may speak are not merely being regulated; his entire speech is being extinguished. Therefore, when examining the constitutionality of those parts of the Dallas licensing scheme, which, unlike zoning regulations, completely ban a person from speaking, I strongly believe that the First Amendment requires a standard of review more strict than that contained in the time, place, and manner doctrine

In *Fernandes*, this court advanced persuasive reasons for concluding that *Freedman's* procedural safeguards should apply to even content-neutral regulation of speech.

Although D/FW's regulatory ordinance purports to be content-neutral, the consequences flowing from a permit denial here are essentially the same as those addressed in *Freedman*:

to an unsuccessful permit applicant, the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights. Therefore, "[t]he *Freedman* principle is applicable here."

The lack of these procedural protections in this licensing system means that the opportunity to exercise free speech and other associational rights can be postponed for substantial periods of time before adequate review. *Fernandes*, 663 F.2d at 628 (citations omitted). This reasoning also applies in the current case. When Dallas denies a license to an adult bookstore or movie theater, it impairs the ability to speak. Likewise, a delay in a judicial determination of the propriety of the denial continues that impairment. Under the ordinance, "the opportunity to exercise free speech and other associational rights can be postponed for substantial periods of time before adequate review." Thus, *Fernandes* and *Freedman* require the procedural safeguards.

II

I must also dissent from the majority's holdings regarding some of the substantive licensing provisions. Before a license may issue, Section 41-5 (a) (6) of the ordinance requires that the premises of a sexually oriented business first be "approved by the health department, fire department, and the building

official as being in compliance with applicable laws and ordinances." The Seventh Circuit, however, struck down a similar ordinance in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

The ordinance in *Genusa*, like the Dallas ordinance, was partially motivated by a desire to retard urban blight. *Id.* at 1214. The *Genusa* court found, however, that this interest could not justify special safety inspections, stating "there is nothing in the record to indicate that adult bookstores, as a class, contain more faulty light switches or other violations than regular bookstores, as a class." *Id.* Thus, the court concluded that the ordinance was not shown to further any legitimate interest unrelated to the suppression of free expression. For this reason, the court invalidated the inspection provision. *Id.* at 1215.

Likewise, the City of Dallas has produced no legitimate justification for its prelicensing health, fire, and builkding code approval requirement.[4] Adult bookstores are, of course, subject to the same health and safety laws as any other

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4 In footnote 28 the majority suggests that the Appellants have not raised this issue. The majority says that the Appellants' only attack on Section 41-5(a) (6) is that the section vests too much discretion in city officials. However, the Appellants' arguments about discretion are clearly a First Amendment challenge to Section 41-5(a) (6). Thus, the Appellants have raised the issue of the section's constitutionality. Additionally, in attacking Section 41-7, the post-licensing inspection provision, the Appellants quote *Genusa* in raising the issue of the city's justifications for imposing additional health, safety, and building code requirements. Thus, I would think that this court may now address whether Section 41-5(a) (6) is legitimately justified.

business. They may not, however, "be singled out for special regulation unless the city can demonstrate that such action is narrowly devised to further a substantial and legitimate state interest unrelated to censorship or the suppression of protected expression." *Id.* at 1214. Section 41-4 (a)(6) is, therefore, not constitutionally justified. Moreover, following this same reasoning, Section 41-7, which the majority characterizes as "a provision permitting warrantless inspection," should be invalid. *See Id.* at 1221 (striking down provision that required biannual warrantless inspections).[5] That section also relates to burdensome health and safety inspections.

I am also troubled by the majority's analysis upholding the provision allowing the denial of a license to persons convicted of certain crimes. Courts have frequently condemned the denial of a license to engage in speech related activities because of a person's criminal history. As this court has stated, "[p]ersons with prior criminal records are not First Amendment outcasts." *Fernandes*, 663 F.2d at 630; *see also Genusa*, 619 F.2d at 1219 n.40 ("We know of no doctrine that permits the state to deny a person First Amendment liberties other than the right to vote solely because that person was once convicted of a crime or other offense."). The majority cites *DeVeau v. Braisted*, 80 S.Ct. 1154 (1960) to argue that barring persons with criminal records from certain employment is a common legislative

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5 I stress that I would invalidate this provision on First Amendment grounds, and I thus give no opinion regarding the Fourth Amendment challenge.

device that needs to pass only minimal scrutiny. However, *DeVeau* by its own terms applies only to "certain employments closely touching the public interest." *Id.* at 1154 (discussing sitting on a jury, entering the Army, or holding an office of trust under the United States). Clearly, the government's interest in employment in sexually oriented businesses is not as great as its interest in such vital areas.

A recent Supreme Court opinion, *Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172 (1986), illustrates that statutes that have more than an incidental impact on speech must be strictly scrutinized–even if the statute is an attempt to fight crime. The Court in *Arcara* upheld a statute allowing the closure of businesses used for prostitution, even as applied to an adult bookstore. However, the reasons given by the Court for not applying strict scrutiny in *Arcara* illustrate that such scrutiny should apply in the current case. *Arcara* involved a statute of general application; the statute provided for the closure of *any* building found to be a public health hazard. The Court relied on the fact that the statute did not "inevitably single out bookstores or other engaged in First Amendment protected activities for the imposition of its burden . . . . " *Id.* at 3177.[6] The Court held that the First Amendment was not implicated by the statute, *id.* at 3178, because it imposed only an incidental burden of the exercise of free speech. *Id.* at 3177 (stating that the severity of

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6 Moreover, the Court distinguished *Arcara* from cases involving prior restraints because the respondent could simply move to another location to continue his bookselling. 106 S.Ct. at 3177 n.2.

the burden was "dubious at best" and was mitigated by the fact that respondents could sell their material at another location). For that reason the Court declined to apply the strictest scrutiny. *Id.*

The Dallas ordinance does single out those engaged in First Amendment activity and must use the least restrictive means to accomplish its legitimate purposes. The burden imposed on one denied a license is extremely heavy–for a period of years, that person is denied the ability to engage in certain speech. Before the court is willing to accept such a heavy burden as the least restrictive means, it should require that the City produce "impressive" evidence that allowing convicted felons to speak "will 'surely result in direct, immediate, and irreparable damage.'" *Fernandes*, 663 F.2d at 629-630 (quoting *New York Times Co. v. United States*, 91 S.Ct. 2140, 2149 (1971) (Stewart, J., concurring).

The majority would not place a heavier burden on the government to support the substantive licensing provisions than the zoning provisions. According to the majority, "[w]hether a license is denied because the business is improperly located or because the business is improperly maintained, the effect is the same–the operator must refrain from the activity and his only alternative is to comply with the Ordinance and obtain a license." However, a person who is prevented from speaking at one location because of a zoning restriction can move to the alternative location that must exist.

A person barred from speaking because of his criminal history has no such option.

Although I understand the majority's desire to not interfere with a city that is struggling to fight crime and urban blight, I am unwilling to let that desire interfere with this court's duty to strictly analyze the methods chosen by the city when those methods directly implicate the First Amendment. Because I believe the majority has not applied the required strict scrutiny, and because some of the chosen licensing provisions and procedures cannot withstand such scrutiny, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CASE NO. CA3-86-1759-R

FW/PBS, INC., DSB, INC.,	)
CHARLES E. CARLOCK,	)
LONE STAR MULTI THEATRES,	)
BEVERLY K. VAN DUSEN,	)
BILL STATEN, JR.,	)
BI-TI ENTERPRISES, INC.,	)
GATTIE CORPORATION	)
J.R.E. ENTERPRISES	)
ENTERTAINMENT UNLIMITED,	)
JOHN RANDALL DUMAS,	)
SOUTHERN BELLES PARTNERSHIP,	)
BIMBO BARS, INC.	)
S.B. La BARE, INC.	)
S.B. YOUNGBLOODS, INC.,	)
TEMPO TAMERS, INC.,	)
CORPORATION LEX, INC.,	)
JOHN R. DUMAS, INC.,	)
M.J.R., INC., D. BURCH, INC.,	)
DE JA VU, INC.,	)
ALLEN & BURCH, INC.,	)
CALVIN BERRY, III.,	)
SAUJAY PATEL,	)
RUDOLF FERNANDEZ, and	)
DALLAS MOTEL ASSOCIATION	)
	)
vs.	)
	)
THE CITY OF DALLAS,	)
A. STARKE TAYLOR, and	)
BILLY PRINCE	)

ORDER OF JUDGMENT

Defendants' motion to dismiss is DENIED and their motion for summary judgment is GRANTED, but DENIED as to subsections 41A-5(a) (8), 41A-5(c), part of 41A-5(a) (10) ("under indictment"), and 41A-5(a) (10) (A) (iii), (vi) - (ix). Plaintiffs' motions are GRANTED only to those subsections. The City is enjoined from enforcing the subsections, and they are severed (id. at section 41A-23[5]). Thus limited, the Ordinance is constitutional.

Signed this 12th day of September, 1986.

JERRY BUCHMEYER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FW/PBS, INC., et al.	)	
	)	
vs.	)	CA3-86-1759-R
	)	
THE CITY OF DALLAS, et al.	)	

MEMORANDUM OPINION

The law of zoning allows the will of a majority, expressed through a representative body, to control the evolution of a community and shape its character.[1] The law of free speech, in contrast, prevents the majority will from suppressing minority expression that the majority finds intolerable.[2] It is perhaps inevitable that the two values should

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1 See Euclid v. Amber Realty, 272 U.S. 365 (1926) and Lombardo v. Dallas, 124 Tex. 1, 73 S.W. 2d 475 (1934) (first establishing that zoning is a proper exercise of the police power), overruling Spann v. Dallas, 111 Tex. 350, 235 S.W. 513 (1921) (zoning as unauthorized intrusion on property rights); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (zoning may promote "family values [and] youth values"); Berman v. Parker, 348 U.S. 26, 33 (1954) (zoning may promote values that "are spiritual as well as physical, aesthetic as well as monetary"); Stansberry v. Holmes, 613 F.2d 1285, 1288 (5th Cir.), cert. denied, 449 U.S. 886 (1980) ("zoning provides one of the firmest and most basic of the rights of local control").

2 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas"); Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) (state is "denied the power to prohibit dissemination of social, economic, and political doctrine which a vast majority of its citizens believes is false and fraught with evil consequence"); United States v.

clash, when a zoning ordinance attempts to limit the freedoms of those involved in expressing unpopular views.[3] A body of first amendment/zoning jurisprudence has thus emerged, in an attempt to reconcile this potential for conflict.[4] Because the zoning law under attack in this case -- the recently enacted "sexually oriented business" ordinance of the City of Dallas -- follows the dictates of this recent hybrid body of law, it is

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Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (constitution embodies principle of "free thought -- not free thought for those who agree with us but freedom for the thought we hate"); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (Ku Klux Klan); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (the "right to receive information and ideas, regardless of their social worth, is fundamental"); Cohen v. California, 403 U.S. 15, 25 (1971) ("in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated"); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1982); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

3 See Goldman v. Weinberger, 54 U.S.L.W. 4298, 4304 (U.S. 1986) (Brennan, J., dissenting) ("in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority").

4 See Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976); New York v. Uplinger, 467 U.S. 246 (1984); City of Renton v. Playtime Theatres, Inc., 54 U.S.L.W. 4160 (U.S. Feb. 25, 1986); New York v. P.J. Video, 54 U.S.L.W. 4396 (U.S. April 22, 1986); Arcara v. Cloud Books, Inc., 54 U.S.L.W. 5060 (U.S. July 7, 1986); Basiardanes v. City of Galveston, 682 F. 2d 1203 (5th Cir. 1982); Stansberry v. Holmes, 613 F.2d 1985 (5th Cir.), cert. denied, 449 U.S. 886 (1980); Hart Bookstores v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980); Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980); Northend Cinema, Inc. v. Seattle, 90 Wash. 2d 709, 585 P.2d 1153 (1978), cert. denied sub nom. Apple Theatre v. Seattle, 441 U.S. 946 (1979). See also United States v. O'Brien, 391 U.S. 367 (1968); Schad v. Mount Ephraim, 452 U.S. 61 (1981); Erznoznick [sic] v. City of Jacksonville, 422 U.S. 205 (1975).

constitutional, except for the four minor exceptions discussed below.[5]

I. The Ordinance

On June 12, 1986, the Dallas city attorney presented a proposed ordinance regulating sexually oriented businesses to the Dallas City Plan Commission. The Commission considered studies carried out in other cities, but did not undertake a study of Dallas. See Defendants' Exhibit (DX) 6 (Austin), DX 7 (Indianapolis), and DX 11 (Lo Angeles). The Commission did consider, however, a map of Dallas indicating areas in which sexually oriented businesses could locate under the proposed ordinance. See Transcript (DX 1) at 5, 30-33. The Commission also heard public testimony, both for and against the proposed ordinance. See id. at 11-51. The Commission voted unanimously to recommend adoption of an ordinance regulating sexually oriented businesses[6]

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5 This opinion resolves the case on cross-motions for summary judgment, because there are no genuine issues of material fact. See Celotex Corp. v. Catrett, 54 U.S.L.W. 4775 (U.S. June 25, 1986). The Dallas sexually oriented business ordinance is attached as Appendix A.

6 The rubric of "sexually oriented business" was apparently adopted not because it yielded a snappy, if somewhat unfortunate, acronym ("S.O.B"), but because a witness before the Commission testified that the alternative term, "adult entertainment," is one "that the pornographers invented to sort of dilute the anguish that people would have if they knew what was actually going on in these places." Transcript (DX 1) at 15 (testimony of Elvin Arnold, Dallas Ass'n for Decency); see also DX 17 at 4 (reflecting cause for name change was Arnold's testimony).

The Ordinance went before the Dallas City Council on June 18, 1986. The Council considered the three studies that were before the Commission, see Transcript (DX 17) at 3. The Council also considered a Dallas study comparing crime rates in two commercial sections, one with sexually oriented businesses and one without. See id. at 3 (finding crime rates 90 percent higher in adult district). After hearing public comment -- unanimously in favor of the ordinance -- the Council adopted it by unanimous vote. See id. at 28. Both representative bodies were in unanimous accord on the benefits of the ordinance.

Legislative intent. Divining the intent of a legislative body is inherently problematic,[7] but the intent of both the Commission and the Council in adopting the Ordinance is transparently clear. Five of the 15 members of the Commission[8] and four of the 11 members of the Council[9]

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[7] Determining legislative intent here does not involve the thorny problems courts have associated with drawing intent from incomplete journals of congressional debates. See Chrysler Corp. v. Brown, 441 U.S. 281, 31 (1979); Aldridge v. Williams, 3 How. (44 U.S.) 9, 24 (1845); Blitz v. Donovan, 740 F.2d 1241, 1247 (D.C. Cir. 1984); Northern Colo. Water Conservancy Dist. v. Federal Energy Regulatory Comm'n, 730 F.2d 1509, 1518 (D.C. Cir. 1984) (Wright, J.); see also Marc N. Garber & Kurt A. Wimmer, President's Statements at Signings No Help to U.S. Judges, 8 (52) Nat'l L.J. 15, 42 (Sept. 8, 1986). The record here reflects the entire remarks of each legislator and witness, and the Court may divine intent from the proceedings as an integrated whole.

[8] See Commission Transcript (DX 1) at 23 (Albright: "it isn't the product itself that we're attempting to address here, but rather it's the problems that are caused by a certain type of business"); id. at 48 (Averitt:

stated unequivocally -- to no dissent -- that the Ordinance was concerned solely with controlling the secondary effects of sexually oriented businesses on surrounding neighborhoods.[10]

"we're not deciding today whether people should or should not read, watch, do any of these activities"); id. at 49-50 (Albright: "the content has absolutely nothing to do with it"); id. at 51-52 (Wynne: "compelling government objective [is] controlling the crime associated with the concentration of commercial establishments of this type"); id. at 57-58 (Garrigan: "adverse effect that the business of selling pornography has on the surrounding community") id. at 58-59 (Letot: "property values, neighborhood blight, crime").

9 See Council Transcript (DX 17) at 6 (Holcomb: "these types of establishments causing crime"); id. at 23-25 (Ragsdale: adult motels "contine to . . . increase the crime"); id. at 25-26 (Richards: this is part of our anti-crime package"); id. at 26 (Palmer: "clearly, I think that the intent of this ordinance is to reduce crime. It is clearly to reduce urban blight and to reduce the possibility of the deterioration of economic values, both in businesses as well as in residences").

10 This was also the clear intent of the drafter of the ordinance. See Affidavit of Analeslie Muncy (DX 3). Moreover, each of the three studies considered by both the Commission and the Council came to the conclusion that sexually oriented businesses were associated with rising neighborhood crime rates and dropping neighborhood property values. See DX 6 (Austin: appraisers found "negitive impact" on property values and police found crime rate at "nearly double" the whole-city rate); DX 7 (Indianapolis: sex-related crime rate is 77 percent higher in adult area, and property appreciated at only one-third to one-half the city rate); DX 11 (Los Angeles, noting increase in crime but not entirely conclusive on property values in all areas). Other studies, both those explicitly relied on by the drafters and those not used, come to similar conclusions. See DX 8 (Houston); DX 9 (Beaumont); DX 10 (Amarillo); DX 12 (Phoenix); DX 13 (Las Vegas); DX 14 (Seattle).

Most importantly, the study performed of a section of Dallas -- albeit a small and perhaps not entirely representative section -- determined that crime in an area dominated by sexually oriented businesses was 90 percent higher than in the city as a whole. See Study (DX 20); see also Affidavit of Rick Stone (DX 19) (methodology). A similar but more anecdotal study, carried out by the Sheraton-Mockingbird hotel, demonstrated substantial crime in its vicinity arguably generated by the presence of sexually oriented businesses. See Sheraton Study (DX 22); see also Affidavit of J.W. Vandeveer (DX 21).

Both groups stated that they were concerned not with the content of the speech associated with sexually oriented businesses, but with the crime, urban blight, and plummeting property values that inevitably seize the neighborhoods where such businesses locate. It is of no moment that the public speakers in favor of the Ordinance supported it almost singularly in hopes that it would indeed suppress the speech purveyed by sexually oriented businesses,[11] as neither the Council nor the Commission relied on the specious view that pornography "causes" various social ills and should thus be

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11 There is little doubt that the most vocal supporters of the ordinance -- from such groups as the Dallas Association for Decency, the American Renewal Foundation, and the Citizens for Decency Through Law -- applauded the ordinance for its incidental impact on speech. Although such witnesses may have had the intent to "zone [sexually oriented businesses] out of existence" by a law that was the "strongest vehicle toward elimination" of such businesses, see DX 6 at 3 (remarks of Atlanta city attorney that formed basis for finding of improper motive, see Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 [N.D. Ga. 1981]), the City evinced no such illegal motive. Cf. Weinstein, Regulating Pornography: Recent Legal Trends, Land Use Law, February 1982, at 4. No inquisition into the "true" intentions of the legislators is warranted here, cf. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 270 (1977), as the operative effect of the law and the statements of the legislators indicate that the purpose of the law was permissible. See Palmer v. Thompson, 403 U.S. 217, 224 (1971), Washington v. Davis, 426 U.S. 229, 243 (1976) ("operative effect of the law rather than its purpose is the paramount factor").

eliminated.[12] The intent of the City in passing the Ordinance

12 Cf. U. S. Department of Justice, Attorney General's Commission on Pornography, Final Report 305 (Washington, D.C.: Government Printing Office, July 1986) (relied upon by defendants). In this connection, the Dallas City Council and Plan Commission could instruct the Meese Commission on the difference between correlation and causation. The critical inquiry here is whether secondary effects are associated with speech, see Renton v. Playtime Theatres, 106 S. Ct. 925 (1986). The Meese Commission -- which performed no original research -- ignored decades of scientific evidence to conclude that pornography "causes" crime. But see, e.g., Malamuth & Donnerstein, The Effects of Aggressive-Pornographic Mass Media Stimuli, 15 Advanced and Experimental Social Psychology 103 (1982); Malamuth & Feshbach, Testing the Hypotheses Regarding Rape: Exposure to Sexual Violence, Sex Differences, and the Normality of Rapists, 14 Journal of Research in Personality 121 (1980); Malamuth, Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli, 10 Archives of Sexual Behavior 33 (1981); Commission on Obscenity and Pornography, Report (1970) ("erotic material is [not] a significant cause of sex crime").

There is a concurrent judicial recognition that the tenuous link between pornography and crime is not sufficiently established to form the basis of any sound public policy. See, e.g., Stanley v. Georgia, 394 U.S. 557, 567 (1969) ("given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits"). Indeed, the premier case on pornographic literature pointed out that even the most innocuous -- and, indeed, moral -- material may lead to violent sex crime:

> Heinreich Pommerenke, who was a rapist, abuser, and mass slayer of women in Germany, was prompted to his series of ghastly deeds by Cecil B. Demille's The Ten Commandments. During the scene of the Jewish women dancing about the Golden Calf, all the doubts of his life came clear: women were the source of the world's trouble and it was his mission to both punish them for this and to execute them. Leaving the theater, he slew his first victim in a park nearby. John George Haigh, the British vampire who sucked his victims' blood through soda straws and dissolved their drained bodies in acid baths, first had his murder-inciting dreams and vampire longings from watching the 'voluptuous' procedure of -- an Anglican High Church Service!

was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself.

The Council's findings. The Ordinance enacted by the City incorporated several findings. The City first found that it has authority to regulate businesses pursuant to its police power, and that licensing is a reasonable means to ensure that subject businesses comply with regulations. See Ordinance (DX 16) at 2. The Council then found that a substantial number of sexually oriented businesses require regulation to protect the "health, safety, and welfare" of the establishments' patrons and citizens in general. Public safety authorities should regulate such businesses, the Council reasoned, because the businesses "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature" and because of the "concern over sexually transmitted disease." Id. The Council next found that arrests for sex-related crimes near sexually oriented businesses have been "substantial," and that there is "convincing documented evidence" that sexually oriented businesses are associated with falling property values of surrounding business and residential areas. Then, the

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Memoirs v. Massachusetts, 383 U.S. 413, 432 n. 11 (1966) (Douglas, J, concurring), quoting Murphy, The Value of Pornography, 10 Wayne L. Rev. 655, 668 (1964).

Based on this false and largely discredited causal nexus, the Meese Commission recommends the constitutionally suspect course of eliminating the speech rather than eliminating its secondary effects -- the better course, followed here.

Council found that when such businesses are located in close proximity to one another, "urban blight" and a decrease of the quality of life in adjacent areas results. Finally, the Council stated that its intent was to minimize these adverse effects, thus preserving property values in surrounding neighborhoods, deterring the spread of urban blight, and decreasing crime. Id. at 5. The Council emphasized, however, that it did not intend to limit access by adults to sexually oriented material protected by the first amendment. Id.[13]

The Ordinance's terms. Based on these findings, the Council enacted an ordinance that pervasively regulates the operation of all sexually oriented businesses in Dallas. The most important changes made by the Ordinance, which is [sic] discussed in detail with the relevant arguments, are (1) strict locational prohibitions, including the requirement that a business be at least 1,000 feet from another sexually oriented business, or a church, school, residential area, or park;[14] (2) required licensing and inspection for all regulated businesses; (3) disqualification from licensure of any applicant who has been convicted of a specified crime, or whose spouse has been so convicted; (4) requirements that all patrons in an arcade --

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13 The Ordinance makes it a defense that "each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value." Ordinance at 41A-21(e); see also Roth v. United States, 354 U.S. 476, 489 (1957).

14 The "location" restriction also provides that there may not be more than one sexually oriented business "in the same building, structure, or portion thereof." See Ordinance, section 41A-13(c).

even if within a closed booth -- be within the sight of a manager; and (5) various layout, furnishing, hiring, and lighting restrictions on regulated businesses.

II. The Plaintiffs

The plaintiffs in this case operate seven of the nine types of sexually oriented businesses classified in the Ordinance: (1) adult arcades; (2) adult bookstores or adult videostores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theaters; (6) adult theaters; and (7) nude model studios. There are no escort agencies or sexual encounter centers that have appeared to challenge the Ordinance.[15]

Under section 41A-13(f) of the Ordinance, each business is deemed a "nonconforming use" because of its location within 1000 feet of another sexually oriented business, or a church, school, residential district, or park. The plaintiffs may continue their business for a period of three years from June 18, 1986, unless "sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more."

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15 Even if representatives of each of the two absent sexually oriented businesses were present, it would not affect the constitutionality of the Ordinance. There is some question, however, about the vagueness and breadth of the primary business purpose of a sexual encounter center: "activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude." Ordinance, 41A-2(16)(B). Although defendants broadly assert that "such businesses are "not entitled to first amendment protections anyway," Response at 3 n.l, citing Stansberry v. Holmes, 613 F.2d 1285 (5th Cir.), cert. denied, 447 U.S. 929 (1980), the businesses are certainly entitled to fair notice that their conduct is prohibited by statute, see Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971). As the issue is not squarely presented to the Court, it need not be resolved.

Plaintiffs are also prohibited from "increasing, extending, or altering" their businesses unless they are changed to a conforming use. At the conclusion of the three-year period under 41A-13(f), only the "first-established and continually operating" sexually oriented business at a particular location may continue to operate -- so that the dispersal of sexually oriented businesses in Dallas will be completed by June 18, 1989.[16]

The Ordinance would force many plaintiffs to relocate. Many are near specified-use areas; others are within 1000 feet of one another -- as are plaintiffs Deja Vu, Texas Rose, Baby Dolls Saloon, Million Dollar Saloon II, Expose, and Bachman Cafe. The relocation provisions threaten the businesses with enormous expenditures; many have great investments in their locations and the value of their property -- such as S.B. Sugars, Inc., which has obtained financing on a parking lot valued at $1,000,000. Other plaintiffs face economic hardship from the Ordinance's restrictions on their activities. Adult motels, for example, will be restricted to renting rooms for at

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16 A sexually oriented business that has been denied licensure because of location restrictions may apply for an exemption under section 41A-14. The application is decided by a permit and license appeal board, with reference to enumerated findings required by the Ordinance. An exemption may only allow operation of a sexually oriented business for 12 months, at which time the business may apply for another exemption. The standards set forth in this section are drawn almost verbatim from Young, 427 U.S. at 54 n.7. If the City improperly denies a request for exemption -- e.g., by failing to apply the Young standards in section 41A-14 -- the applicant has recourse in a state court suit, by showing that the City's denial is not supported by "substantial evidence," see post at 21 n.26.

least ten hours, rather than the two-hour period common now -- thus cutting their income by up to 80 percent.

The main attack in this case is, therefore, the location restriction and the three-year amortization period of section 41A-13(f). Plaintiffs also level attacks against each provision of the Ordinance that applies to them, claiming that the Ordinance's provisions are vague and overbroad, that its licensure requirement is unconstitutional, that it vests overbroad discretion in the Chief of Police, and that the Ordinance is not sufficiently related to the City's objectives.

III. Standing

As a threshold issue, the City makes the argument -- apparently one considered obligatory in cases such as this -- that various defendants [sic] have no standing to challenge the Ordinance. See City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983); Brown v. Edwards, 721 F. 2d 1442, 1446-47 (5th Cir. 1984). Moreover, the City claims that the plaintiffs' challenges are not ripe, because there is no "real and immediate threat" of closure of their businesses. Plaintiffs do not, however, present "abstract" questions of possible injuries. There is no doubt that the Ordinance, once effective, would pervasively change the manner in which each plaintiff runs his or her business; many would close. "It is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been

sought." Fernandes v. Limmer, 663 F2d 619, 625 (5th Cir. 1981); see also Star Satellite, Inc. v. City of Biloxi, 779 F. 2d 1074, 1078 (5th Cir. 1986); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969). The City's position amounts to a claim that plaintiffs' attacks could be asserted as a defense to an eventual state prosecution for defiance of the Ordinance. Such a forum would not, however, protect plaintiffs' rights. See Dombrowski v. Pfister, 380 U.S. 479 (1965) (defense in state suit "will not assure adequate vindication of constitutional rights. . . a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition"); Steffel v. Thompson, 415 U.S. 452 (1974); Gibson v. Berryhill, 411 U.S. 564, 577 (1973); Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975). No state prosecution is underway, and the complete determination of plaintiffs' claims here will aid and expedite the City's efforts, rather than delaying and hindering them.[17] Cf. Huffman v. Pursue, Ltd., 420 U.S. 592, 604-05 (1975); Trainor v. Hernandez, 431 U.S. 434, 446 & n.8 (1977). Under the factual allegations presented, plaintiffs do

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17 A delayed and piecemeal determination of plaintiffs' constitutional claims would not serve the City. As counsel agreed in chambers when this Court set an accelerated schedule for resolving this controversy on cross-motions for summary judgment, a wholesale determination of the Ordinance's validity would permit orderly enforcement of the law and an expedited appeal, and save both the plaintiffs and the City substantial funds allotted in anticipation of protracted litigation. See DX 17 at 27-29.

have standing to challenge the Ordinance and their challenge is ripe for determination.

IV. Constitutionality

Regardless of the Ordinance's focus on the secondary effects of sexually oriented businesses, there is no doubt that its terms have an incidental impact on expression that is protected by the first amendment.[18] Because of this impact, it is appropriate to analyze the statute under the four-part test of United States v. O'Brien, 391 U.S. 367, 377 (1968). See City of Renton v. Playtime Theatres, Inc., 54 U.S.L.W. 4160 (U.S. Feb. 25, 1986); Young v. American Mini Theatres, 427

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18 See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981); Jenkins v. Georgia, 418 U.S. 153 (1974); Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495 (1952). The City does not allege that the conduct in which plaintiffs engage involves obscenity, which is prohibited by separate statute and which may permissibly be prohibited because it is not protected by the first amendment. See Miller v. California, 413 U.S. 15 (1973) ("obscene material is unprotected by the first amendment"); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); see also New York v. Ferber, 458 U.S. 747, 757 (1982) (child pornography is outside the protections of the first amendment). Nor does the City advocate the novel -- and largely unsupportable -- position that pornography is, like obscenity, outside the bounds of the first amendment. Cf. Schauer, Speech and "Speech" -- Obscenity and "Obscenity:" An Exercise in the Interpretation of Constitutional Language, 67 Ga. L.J. 899 (1979); Finnis, Reason and Passion: The Constitutional Dialectic of Free Speech and Obscenity, 116 U. Pa. L. Rev. 222 (1967); Attorney General's Commission on Pornography, ante at 6 n. 12, at 260-262 (section entitled "Is the Supreme Court Right," claiming that "the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach to the first amendment issues is incorrect"), citing Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum L. Rev. 391 (1963). See also Memoirs v. Massachusetts, 383 U.S. 413, 453 (1966) (Clark, J., dissenting) (justifying controlling "erotic and pornographic material;" by reference to obscenity's status as non-first-amendment material), citing Hoover, Combating Merchants of Filth: The Role of the FBI, 25 U. Pitt L. Rev. 469 (1964), Hoover, The Fight Against Filth, The American Legion Magazine (May 1961).

U.S. 50, 79 (1976) (Powell, J., concurring). Under the O'Brien test, regulation is justified despite its impact on first amendment interests "[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on . . . first amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, 391 U. S. at 377. Incidental burdens on free expression may be analyzed under this test as time, place, and manner regulations. Renton, 54 U.S.L.W. at 4161.[19] The first three elements may be considered without reference to the specific requirements of the Ordinance; a determination of whether the Ordinance's particular terms follow the least restrictive means available must, however, be made independently for each of the Ordinance's restrictions.

First, it is without doubt that the police power of the City encompasses the power to enact a zoning and regulatory ordinance such as that considered here. See ante at 1 n.1; see also Renton, 54 U.S.L.W. at 4161 (similar ordinance within police power). Second, the interests the City studied and

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19 Time, place, and manner restrictions are permissible if they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); City Council v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 648 (1981). But see Renton at 4164 (Brennan, J., dissenting) (zoning adult businesses necessarily content-based).

intended to further by the Ordinance -- crime control, protection of property values, and prevention of urban blight, see ante at 4-5 & nn. 8-9 -- are both important and substantial. See Young, 427 U.S. at 49 (Powell, J., concurring).[20] Third, the intent of the City -- garnered from complete reports of both the Plan Commission and City Council proceedings -- demonstrates that the governmental interest was unrelated to the suppression of free expression. See ante at 4-5 nn. 8-10. The legislative response to the secondary effects of sexually oriented businesses evinced a clear intent to leave alternative avenues open for expression of that genre, while lessening the effects of such businesses on the surrounding community.[21] The first three elements of the O'Brien test are satisfied;

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20 Indeed, the three governmental interests sought to be advanced by the Ordinance are at the very heart of the rationale for allowing local governments the power to zone:

> It [is] undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult concept of quality of life."

Young, 427 U.S. at 80 (Powell, J. concurring), quoting Village of Belle Terre v. Boraas, 416 U.S. at 13; see also ante at 1 n.1.

21 The unanimity of permissible intent here far surpasses that upheld by the Supreme Court in passage of the Renton ordinance; the combination of legislative study and intent demonstrated here might even satisfy the standards of Justices Brennan and Marshall in dissent. Although the impetus for this result may be the particular type of content conveyed by such businesses, the government may permissibly tailor its reaction to different messages according to the degree to which its interests are implicated. See Young, 427 U.S. at 82 n.6 (Powell, J, concurring), citing Tinker v. Des Moines School Dist., 393 U.S. 503, 509-11 (1969); Procunier v. Martinez, 416 U.S. 396, 413-14 (1974); Greer v. Spock, 424 U.S. 828, 842-44 (1976) (Powell, J., concurring).

evaluation of the fourth factor requires reference to each challenged section of the Ordinance.

Locational restrictions. The element of the Ordinance that is most vigorously challenged is the one element that is least susceptible to challenge after Young and Renton. Section 41A-13 states that a sexually oriented business cannot be located within 1000 feet of (1) a church; (2) a public or private elementary or secondary school; (3) a boundary of a residential district; (4) a public park adjacent to a residential district; (5) the property line of a lot devoted to residential use; or (6) another sexually oriented business. If a regulated business is currently in violation of this section, it is deemed a nonconforming use and allowed to continue to operate for three years. A properly located regulated business is not rendered a nonconforming use by the subsequent location of a church, school, park, or residential area within 1000 feet of the business.

No doubt remains after Renton and Young that dispersed zoning of sexually oriented businesses is permissible, provided that "reasonable alternative avenues of communication" exist. See Renton, 54 U.S.L.W. at 4162; see also Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-6 (1981); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). In Young, a Detroit zoning plan similar to that challenged here was approved, but "[the] situation would have been quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."

Id. at 71 n.35; accord, Basiardanes v. City of Galveston, 682 F.2d 1203, 1214 (5th Cir. 1982) (only "oppressive options remained to an aspiring promoter of adult films"); Olmos Realty Co. v. State, 693 S.W.2d 711, 714 (Tex.Civ.App. -- San Antonio, no writ); Keego Harbor Co. v. Keego Harbor, 657 F.2d 94 (6th Cir. 1981) (ordinance prohibited all theaters); Alexander v. City of Minneapolis, 698 F.2d 936, 937-38 (8th Cir. 1983) (ordinance led to closing all theaters); Purple Onion, Inc., v. Jacksonville, 511 F. Supp. 1207, 1217 (N.D. Ga. 1981) (sites either "unavailable, unusable, or so inaccessible to the public [that] they amount to no locations"); Renton, 54 U.S.L.W. at 4167 (Brennan, J., dissenting) (must have "reasonable opportunity to operate"). The majority opinion in Renton, however, has made it clear that there need be only a "reasonable" opportunity to locate within the city; the Court expressly rejected findings of fact that the 520 acres left open by the ordinance was not truly "available" for regulated use.[22]

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22 In Renton, the Court held that it was clearly erroneous for the circuit court to find the ordinance invalid because "practically none" of the available land was currently for sale or lease, and because there were no "commercially viable" locations left open by the ordinance. See City of Renton v. Playtime Theatres, Inc., 748 F.2d 527, 534 (9th Cir. 1985); Renton, 54 U.S.L.W. at 4163. Rather than reviewing in detail the choices available to regulated businesses under the ordinance, the Court stated that "the first amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theatre within the city." Renton, 54 U.S.L.W. at 4163. The first amendment, the Court said, does not require that "speech-related businesses . . . obtain sites at bargain prices," id., but only that a city "make some areas available" for such businesses, id. at 4164.

The land available for sexually oriented businesses under the Dallas ordinance is substantial, and satisfies Basiardanes and Renton. The maps considered by the City upon enacting the Ordinance detail several areas that are open to sexually oriented businesses, and it cannot be said that a "reasonable" opportunity for such businesses does not exist under the Ordinance. The plan adopted by Dallas differs markedly from the Galveston plan rejected in Basiardanes, 682 F.2d at 1214; that plan incorporated an outright ban on 85-90 percent of the city's total area, and the remaining areas, located "among warehouses, shipyards, undeveloped areas, and swamps," were reached by "few access roads." Id. The Dallas plan, in contrast, permits location in several areas stretching from the inner city area to the north and south suburbs, accessed by such major thoroughfares as Interstate 35, Interstate 30, Loop 12, Highway 183, and Harry Hines Boulevard. Eight to ten percent of the city's total area -- 21,000 acres -- is available. Cf. Renton, 54 U.S.L.W. at 4163 (5 percent). See DX 15; PX 1; DX 27. There is no impediment to the locational restrictions enacted in the Ordinance.[23]

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23 Plaintiff's exhibits 3, 4, and 5, and the Street Affidavit (Sept 10, 1986), command no contrary result. These affidavits seek to establish that the areas left open by the Ordinance are undesirable as a matter of business judgment by those involved in sexually oriented businesses, but it is clear that Renton disavowed reliance on precisely such information. See Renton, 54 U.S.L.W. at 4163-64.

The three-year amortization clause is also challenged. Such clauses, however, are uniformly upheld. See Hart Bookstores v. Edmisten, 612 F.2d 821, 830 (4th Cir. 1979), cert. denied, 100 S. Ct. 3028 (1980) (upholding six-month amortization period); Northend Cinema, Inc. v. Seattle, 90 Wash. 2d 709, 585 P.2d 1153, 1160 (1978), cert. denied sub nom. Apple Theater v. Seattle, 441 U.S. 946 (1979) (upholding three-month amortization period); see also Note, Using Constitutional Zoning to Neutralize Adult Entertainment -- Detroit to New York, 5 Fordham Urban L.J. 455, 472-74 (1977) (advocating one-year amortization period); SDJ, Inc. v. City of Houston, 636 F. Supp. 1359, 1371 (S.D. Tex. 1986) (six-month period). See generally Lubbock Poster Co. v. City of Lubbock, 569 S.W. 2d 935, 940-43 (Tex.Civ.App. -- Amarillo, writ ref'd n.r.e.).[24] The period allowed by the Ordinance is more generous than others that have been upheld;

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24 Plaintiffs' exhibits 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, Affidavits of Bill Staten, Tracey Robertson, Beverly K. Van Dusen, Paul Radnitz, Bruce Wayne Logan, Gayla Marilynn Wolf, J. R. Estes, William C. Evert, Jr., Charles E. Carlock, and Plaintiffs' Statement of Impact all seek to establish that the period is invalid because of plaintiffs' pre-existing debts. Although the Ordinance will harm plaintiffs' profitability, the period is reasonable under accepted principles. See City of University Park v. Benners, 485 S.W.2d 773, 777-78 (Tex. 1972); Zahn v. City of Los Angeles, 274 U.S. 325 (1927) (economic detriment to regulated industries permissible); Ascarate v. Villalobos, 148 Tex. 254, 223 S.W. 2d 945, 950 (1949) (same). This is not a case where structures must be demolished to accomplish the state's reasonable exercise of police power, cf. Lubbock Poster Co., 569 S.W.2d at 940; if it is not profitable for plaintiffs to relocate, the Ordinance does not prohibit them from using their established structures for other enterprises.

it is a valid mechanism used to enforce valid locational regulations.[25]

Licensure requirement. Although there is no constitutional impediment to the concept of requiring sexually oriented businesses to obtain licenses[26] and pay reasonable fees,[27] plaintiffs challenge the manner in which the licensing

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25 Equally valid is the section's provision for an exemption from location restrictions. Even if there were a constitutional entitlement to waiver provisions in an amortization period -- which is doubtful, see Northend Cinema, 585 P.2d at 1159 -- the exemption utilized in this section is that upheld by the Supreme Court in Young, 427 U.S. at 56 (noting that court below rejected vagueness challenge to waiver provisions). Plaintiffs' argument that this section, like the licensure section, vests unbridled discretion in the Police Chief will be dealt with below, see post at 20-21.

Moreover, the section of the Ordinance prohibiting more than one sexually oriented business from locating in the same building -- section 41A-13(c) -- is constitutional. See Hart Bookstores v. Edmisten, 612 F.2d 821 (4th Cir. 1979). As the City admitted at oral argument, it interprets the Ordinance to permit one business to deal in several different media; if the City reneges on this interpretation, it would be a simple matter for an applicant to claim in state court, see Memet v. State, 642 S.W.2d 518, 524 (Tex.Civ.App. -- Houston [14th Dist.] 1982, writ ref'd n.r.e.), that the City is now estopped from changing the interpretation on which this Court based a finding of constitutionality. See Hicks v. Harris, 606 F.2d 65 (5th Cir. 1979) (government may be estopped by official with authority).

26 Licensing, as plaintiffs concede, is a valid method of ensuring that regulated businesses abide by locational and other restrictions. See Genusa v. City of Peoria, 619 F.2d 1203, 1212-13 (7th Cir. 1980); see also Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1171 (4th Cir. 1986); SDJ, Inc. v. City of Houston, 636 F. Supp. at 1368 (S.D. Tex. 1986); Schope v. State, 647 S.W.2d 675 (Tex.Civ.App. -- Houston [14th Dist.] 1982). Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981), hold nothing to the contrary; that court found a specific intent to suppress speech. See id. at 504.

27 See Genusa, 619 F.2d at 1213 (100); Bayside Enterprises v. Carson, 470 F. Supp. 1140, 1148-49 (M.D. Fla. 1979) ($400); Borrago v.

scheme is implemented and the qualifications the scheme imposes upon licensees. The challenge is sustained only as to subsections 41A-5(a) (8), 41A-5(a) (10) (B) (c), part of 41A-5 (a) (10), and 41A-5(10) (A) (iii) and (vi)-(ix); the City will be enjoined from enforcing those sections, which may be easily severed from the remainder of the Ordinance.[28]

It is settled constitutional principle that any license requirement for an activity related to expression must contain narrow, objective, and definite standards to guide the licensing authority. See Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969); Saia v. New York, 334 U.S. 558 (1948). The City argues that the Ordinance vests no discretion in the Chief of Police, as it states that he "shall" approve the issuance of a license "unless" a factual basis for denial exists. This assertion is largely correct, but it is a simplistic view of the actual operation of two subsections of the Ordinance. First,

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City of Louisville, 456 F. Supp. 30 (W.D. Ky. 1978) ($250); Airport Book Store v. Jackson, 248 S.E.2d 623 (Ga. 1978) ($500.). The license fee challenged here is valid; it is not excessive in view of the substantial administrative costs to be defrayed in the implementation of the Ordinance, see Cox v. New Hampshire, 312 U.S. 569 (1941), and is rationally related to the permissible purposes of the Ordinance. It is not, then, a tax levied on an expressive enterprise in violation of the first amendment. Cf. Fernandes v. Limmer, 663 F.2d 619, 632-33 (5th Cir. 1982), cert. dismissed, 458 U.S. 1124 (1982); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983) ("it is beyond dispute that the states and the federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems").

28 The constitutional infirmities identified could also be changed by amendment without significantly altering the Ordinance's purpose in light of the City's objectives.

section 41A-5 (a) (8) allows the police chief to deny a license to an applicant who has been employed in a sexually oriented business on a finding that "he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner" (emphasis added).[29] Second, the Ordinance allows an applicant with a past conviction to be granted a license if the sufficient amount of time has elapsed, but section 41A-5 (c) allows the police chief to grant a license to such an applicant "only if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business" (emphasis added). Neither section provides sufficiently definite standards to pass constitutional muster.

Both sections ask the police chief to make subjective judgments on the fitness of an applicant; neither, then, is controlled by standards "susceptible of objective measurement." Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967). The Ordinance is silent to what conduct may reasonably be considered operation of a business in a "peaceful manner."[30]

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29 This infirmity here is not repeated in the similar language of section 41A-9 (5). That section allows a license to be suspended if a licensee has demonstrated an inability to operate a business "in a peaceful and law-abiding manner thus necessitating action by law enforcement officers." This section is thus limited by its language to certain objective indications of an inability to operate a business peacefully.

30 Indeed, some may find the concept of "peaceful" operation of a sexually oriented business to constitute an oxymoron, in light of recent

The Ordinance is more specific in addressing the "present fitness" of an applicant with a past conviction; in at least one case, however, the specificity itself constitutes overbroad discretion -- one factor the police chief is to take into account is "the amount of time that has elapsed since his last criminal activity." See subsection 41A-5 (c) (3). Under this subsection, then, the police chief is permitted to extend indefinitely the periods specifically enumerated by the Ordinance in subsections 41A-5 (a) (10) (B) (i-iii). By reference to the "extent and nature" of the applicant's past criminal activity, id. at 51A-5(c) (1), the applicant's age at the time of the offense, id. at 41A-5 (c) (2), the applicant's "conduct and work activity," id. at 41A-5 (c) (4), evidence of the applicant's "rehabilitation," id. at 41A-5 (c) (5), and letters "from prosecution, law enforcement, and correctional officers," id. at 41A-5 (c) (6), then, the police chief may determine that an applicant will not be granted a license. These two subsections vest unfettered discretion in the police chief, and cannot survive constitutional scrutiny.[31]

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challenges claiming that pornography is invariably violent to women. See American Booksellers Ass'n. Inc. v. Hudnut, 54 U.S.L.W. 2143 (7th Cir. 1985) (rejecting Minneapolis ordinance as "thought control"); Callahan, Women and Pornography, American Film, March 1982, at 63. Although this view has been invalidated, there is little in the Ordinance to keep similar subjective views from being grounds for license denial (would operating business catering to sadists or masochists, for example, be "peaceful"?).

31 The infirmity could easily be cured by amendment. Section 41A5 (a) (8) could be limited to arrest or police action, as is section 41A-9 (5);

Shorn of the two sections that vest subjective and unguided authority in the police chief, however, the largest part of the licensure section is constitutional. The findings the police chief must make in licensing sexually oriented businesses are based on objectively determinable facts, and are thus permissible. See Memet v. State, 642 S.W. 2d 518, 524 (Tex. Civ.App. -- Houston [14th Dist.] 1982, writ ref'd n.r.e.); Schope v. State, 647 S.W.2d 675, 680 (Tex.Civ.App. -- Houston [14th Dist.] 1982, writ ref'd n.r.e.). Age restrictions are factually based, see subsection 41A-5 (a) (1), as are determinations of past due fees and taxes, see id. at 41A-5 (a) (3),[32] see Schope, 647 S.W.2d at 680 (upholding ordinance including such factors); Bayside Enterprises v. Carson, 470 F. Supp. 1140, 1148 (M.D. Fla. 1979) (upholding unpaid tax or fee provision); Genusa, 619 F.2d at 1219-20 (upholding provision for false statements). Failure to comply with the Ordinance, subsections 41A-5 (a) (4) and (9), may be objectively verified, as may approval of premises by

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section 41A-5 (c) could be limited to the same elapsed-time standard of section 41A-5 (B).

32 This subsection is not invalidated by Doe v. City of Buffalo, 56 N.Y..2d 926, 453 N.Y.S.2d 605, 439 N.E.2d 321 (1982). The language before the New York Court of Appeals provided that "such other information" as the licensing authority might require must be provided. Here, however, the further information that may permissibly be required of an applicant is limited to that "reasonably necessary for issuance of the license." It is thus limited to information the police chief may need to determine whether an applicant is in compliance with other provisions of the Ordinance, and does not confer "open-ended discretionary power." Doe, 56 N.Y.2d at _ 453 N.Y.S.2d at 606, 439 N.E.2d at _.

health, fire, and building officials, subsection 41A-5 (a) (6). See SDJ, Inc. v. City of Houston, 636 F. Supp. at 1368-69 (S.D. Tex. 1986). Whether an applicant resides with someone who has been recently denied a license or whose license has been revoked,[33] subsection 41A-5 (1) (5), may be objectively verified. Finally, although this court agrees that "persons with prior criminal records are not first amendment outcasts," Fernandes v. Limmer, 663 F.2d 619, 630 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982), denial of licensure to

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33 This provision is apparently meant to prevent rejected applicants from skirting the intent of the law by simply recruiting housemates, see Fischer v. Dallas Federal Savings & Loan Ass'n, CA3-79-565-R, slip op. at 7 n.5 (N.D. Tex. June 18, 1985) ("there's nothing that I wouldn't do / if you would be my POSSLQ"), to become "licensees" on behalf of the disappointed applicant. It is thus permissible; although a freedom-of-association challenge could be mounted to the subsection, its success would be most doubtful after Lyng v. Castillo, 54 U.S.L.W. 4864 (U.S. June 27, 1986) (Stevens, J.) (statutory classification based on living arrangement upheld). Indeed, the language of which plaintiffs complain was taken from two other ordinances that have been applied to plaintiffs for years: the theater ordinance, section 46-4 (a) (7), and the dance-hall ordinance, section 14-3.

those convicted of certain specified crimes that are related to the crime-control intent of the law is undoubtedly permitted.[34]

Five enumerated crimes, however, are not sufficiently related to the purpose of the Ordinance to withstand scrutiny. Although thirteen of the offenses are clearly related to the purpose of the Ordinance as it was debated by the City, no findings exist to justify prohibiting one convicted of (1) a controlled substances act violation, (2) bribery, (3) robbery, (4) kidnapping, or (5) organized criminal activity from obtaining a license to operate a sexually oriented business. In the absence of such findings, this Court cannot say that the offenses enumerated are sufficiently related to the purpose of the Ordinance -- either for constitutional purposes, or for purposes of the City's authority under Texas law. See Young,

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34 This principle was squarely addressed in Arcara v. Cloud Books, Inc., 54 U.S.L.W. 5060 (U.S. July 7, 1986) (Burger, C.J.), in which the Court held that a sexually related business could be closed when management was aware of sexual behavior on the premises, in violation of law. See id. at 5062. If violation of law by a licensee may permissible justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure. Accord, 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044 (1975); Borrago v. City of Louisville, 456 F. Supp. 30, 32 (W.D. Ky. 1978); Airport Bookstore, Inc. v. Jackson, 248 S.E. 2d 623 (Ga. 1978), cert. denied sub nom. Gateway Books v. Jackson, 441 U.S. 952 (1979). One intent of the law was to prevent crime; the Ordinance considers only certain crimes to be relevant -- such as prostitution, obscenity, or child pornography, see Ordinance at 41A-5 (a) (10) (a). It allows even those convicted of such offenses to be licensed after a certain amount of time has elapsed, see id. at 41A-5 (a) (10) (B). It is thus narrowly tailored to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome.

427 U.S.50;, 56 n.11;[35] see also Tex. Civ. Stat. Ann. art. 6252-13c (supp. 1986) (denial of license proper only if crime "directly relates to an occupation"). Subsections 41A-5 (a) (10) (A) (iii), (vi), (vii), (viii) and (ix) are thus constitutionally and statutorily invalid.

The language of subsection 41A-5 (a) (10) that compels the police chief to deny licensure to an applicant "under indictment or misdemeanor information" for a specified crime must also fail. Although the city undoubtedly has a legitimate interest in preventing one convicted of a specified crime from holding a license, see ante at 26 and n.34, denial on the basis of mere indictment or information cannot pass constitutional scrutiny.[36] An indictment or information is not evidence of an applicant's guilt, but merely indicates that an ex parte procedure navigated solely by a prosecutor has resulted in a finding of probable cause. See United States v. Calandra, 414 U.S. 338,

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35 The operation of these subsections against the plaintiffs present in this case demonstrates that the effect they would have upon applicants is quite real. Gayla Marilynn Wolf, an owner of a video concern, has been convicted of robbery, see Wolf Affidavit at 3; and William C. Evert, Jr., an owner of a bookstore, has been convicted of a controlled substances act violation, see Evert Statement at 5.

36 Denial of licensure on the basis of investigation into a crime constitutes punishment without the requisite finding of guilt. "Our system of justice reserves punishment to those who have been convicted -- beyond a reasonable doubt -- of an offense; collateral punishment without process has no place in our constitutional scheme." Parks v. Rogers, CA3-85-1411-R, slip op. at 3 (N.D. Tex. 1986); see also Branzburg v. Hayes, 408 U.W. 665, 686-87 (1972) (grand jury serves "as a protector of citizens against arbitrary and oppressive governmental action").

344-45 (1974). The simple act of indictment or information cannot carry the heavy burden implicit in suppressing speech that is protected by the first amendment,[37] and may implicate overbreath in chilling protected speech.[38] Dispositively, however, the prohibition against licensure of one under indictment or information fails the fourth O'Brien test in that less restrictive means of accomplishing the legislative goal exist. If the City intends to forestall revocation procedures against one who is eventually convicted of a specified crime by denying a license to an applicant under indictment, it may easily accomplish this purpose by amending to defer decision for a limited period of time[39] on an application to see if an

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37 This aspect of the Ordinance is not a content-neutral time, place, and manner restriction on protected speech; denial of a license amounts to an absolute suppression of expression. "In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the first amendment without bearing the burden of showing that its restriction is justified." Philadelphia Newspapers v. Hepps, 106 S.Ct. 1558, 1564 (1986). Cf. Smith v. California, 361 U.S. 147 (1959) (procedural rules ordinarily valid may be barred because of the threat to first amendment rights). Surely this burden cannot be carried by a bare statement of probable cause.

38 See Broadrick v. Oklahoma, 413 U.S. 601 (1973). A legitimate theater that occasionally exhibits explicit, non-obscene films but is not a "sexually oriented business," such as various repertory theaters in Dallas, would be forced to curtail such exhibitions in fear that a film that is subject to mere indictment as obscenity would jeopardize a pending license application -- regardless of an ultimate non-obscenity finding.

39 The threat this subsection poses to applicants is palpable. Two plaintiffs here would be foreclosed by its terms -- Beverly D. Van Dusen, owner of two bookstores, has been charged with obscenity violations, and the matter is set for trial, see Van Dusen Affidavit at 2; Bruce Wayne Logan, owner of Eros Dallas, has been awaiting trail for two years on a promotion of prostitution charge, see Logan Affidavit at 2.

adjudication of guilt has been made during this period -- requiring denial and subsequent reapplication is both inefficient, see Posner, Economic Analysis of the Law, passim (1972) (duplicative expending of administrative and legal resources), and constitutionally infirm.[40]

Plaintiffs also attack various procedural aspects of the licensure system, including the appeal process, under Freedman v. Maryland, 380 U.S. 51 (1965). Primary to their contention is their claim that "no judicial review is provided for." This assertion, however, is entirely meritless. Although no provision for judicial review is made, none is needed. One denied a permit may seek a hearing, appeal that hearing, and then turn to courts of law." Memet, 642 S.W.2d at 524; see also Dixon v. Love, 431 U.S. 105 (1977); Harper v. Lindsay, 616 F.2d 849, 858 (5th Cir. 1980). The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards, and comport with Freedman and fundamental tenets of due process.

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40 Section 41A-5 (b), which states that appeal of a conviction shall have no effect on a disqualification, is not subject to a parallel infirmity; such provisions are routinely upheld, as they deny an applicant against whom a finding of guilt has been made. See State Bar Act, section 16 (e), 1A Tex. Rev. Civ. Stat. art. 320a-1 (when attorney is convicted of felony involving moral turpitude or of misdemeanor involving theft embezzlement, or fraudulent appropriation, the district court "shall enter an order suspending the attorney from the practice of law during the pendency of any appeals from the conviction"); see also Bailey v. State, 575 S.W.2d 418 (Tex.Civ.App.--Ft. Worth 1978, writ ref'd n.r.e.); c.f. McInnis v. State, 618 S.W.2d 389 (Tex.Civ. App.--Beaumont 1981, writ ref'd n.r.e.), cert. denied, 456 U.S. 976 (1982).

Definitions. Vagueness challenges are imposed against the various definitions and terms utilized in the Ordinance. All terms used, however, are designed to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute," Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971), in light of common understanding and practices.[41] Grayned v. City of Rockford, 408 U.S. 104, 110 (1971). Indeed, the language of many provisions has been taken from ordinances upheld by the Supreme Court, see Young, 427 U.S. at 53 ("specified sexual activities" and "specified anatomical areas"); City of Renton, 54 U.S.L.W. at 4161 ("primary purpose"). Other elements of the Ordinance have been upheld by the courts. See Hart Bookstores v. Edmisten, 612 F.2d 821, 833 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980) ("distinguished or characterized by"); Miller v. California, 413 U.S. 15, 24 (1973) ("depicting or describing"); Hart Bookstores, 612 F.2d at 834 ("adult bookstore"); Stansberry v. Holmes, 613 F.2d 1285, 1290 (5th Cir. 1980) ("major business," similar to "principal business purpose" used in Ordinance);[42] Basiardanes v. City of

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41 This holding does not embrace the definition given to sexual encounter centers, as no such business is present. See ante at 10; n.15.

42 Requiring a vendor of books dealing in "specified sexual activities" to have the sale of such material as "one of its principal business purposes" is the sole bar to finding that, for instance, the Government Printing Office Bookstore is a "sexually oriented business" due to its pandering of the Meese Commission report, ante at 6-7 n.12 -- a work that is explicit in its description of activities 41A-2 (19) (A), (B), (C), and (D). See, e.g., the

Galveston, 682 F.2d 1203, 1210 (5th Cir. 1982) ("regularly" features); Northend Cinema, Inc. v. Seattle, 90 Wash.2d 709, 585 P.2d 1153 (1978), cert. denied sub nom. Apple Theater v. Seattle, 441 U.S. 946 (1979) ("adult theater"); 15192 Thirteen Mile Road, Inc. v. City of Warren, 626 F. Supp. 803, 808 (E.D. Mich. 1985) ("escort agency"); SDJ, Inc. v. City of Houston, 636 F. Supp. at 1364 (topless bars).[43] There is no constitutional impediment to the phraseology of the Ordinance.

Internal restrictions. The Ordinance requires various internal restrictions of regulated businesses -- from major renovations in the design of adult arcades to the allowance of sofas in nude modeling studios. While such intrusions into the internal design of regulated businesses may seem unduly

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155 pages of graphic descriptions of pornographic paperback books, peep shows, tabloids, films, and videos -- including complete and very explicit summaries of Deep Throat, The Devil in Miss Jones, and Debbie Does Dallas -- bravely written, after his prolonged study of and exposure to this relentless and unmitigated sleaze, by the redoubtable Senior Investigator Haggerty. Id. at 1647-1802. Although the Meese Commission concluded that sustained "viewing [of such] nonviolent, sexually explicit material . . . is statistically related to a higher probability of" sexual crimes, id. at 172, we are merely left to wonder about the fate of Senior Investigator Haggerty and his tragic battle against these statistical probabilities.

43 Plaintiffs make the general objection that the Ordinance cannot be directed to adult cabarets at all, claiming that a "paucity" of evidence concerning such establishments was considered by the City. This is incorrect, as both major studies considered -- those from Austin and Indianapolis -- concerned topless bars. Moreover, any consideration of the Ordinance and the discussion surrounding it, as a whole, reveals that the City did indeed consider topless bars part of the condition the Ordinance seeks to ameliorate; the City may permissibly include adult cabarets in the Ordinance.

restrictive, they have consistently been upheld.[44] See Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1169 (4th Cir. 1986) (requiring closed viewing booths to be within view of management "falls within the broad general limits of the police power" and satisfies O'Brien); Ellwest Stereo Theatres v. Wenner, 681 F.2d 1243, 1246 (9th Cir. 1982) (same); EWAP, Inc. v. City of Los Angeles, 92 Cal.App.3d 179, 158 Cal.Rptr. 579 (1979) (same); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1227 (N.D. Ga. 1981) (nude modeling studios may be pervasively regulated, as they contain no element of "expression"); Upper Midwest Booksellers v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985) (display to minors); Pollard v. Cockrell, 578 F.2d 1002, 1013 (5th Cir. 1978) (permissible to distinguish between "legitimate" and regulated use of nude models). The City did indeed make sufficient findings to justify restrictions on adult motels, see ante at 4 n.9 (statement of Ms. Ragsdale), cf. Patel & Patel v. South San Francisco, 606 F. Supp. 666, 671 (N.D. Cal. 1985) (no findings); moreover, recent pronouncements of

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44 A major internal restriction that plaintiffs saw as an egregious intrusion upon the working of their businesses -- the interpretation of the Ordinance that only one "type" of sexually oriented business may be located in one building -- is, in fact, nonexistent. The City admitted at oral argument that the Ordinance does not operate to restrict several media being dealt with by one sexually oriented business; thus, those plaintiffs that have, for example, an adult arcade plus a book and video store may continue to operate in that manner (albeit in a new location if they must relocate under the location restrictions).

state power to regulate morality and private consensual sexual activity are probably broad enough to encompass regulations on adult motels. See Bowers v. Hardwick, 54 U.S.L.W. 4919 (U.S. June 30, 1986) (no privacy right to consensual homosexual, and, arguably, heterosexual sodomy); Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (en banc), cert. denied,

54 U.S.L.W. 3863 U.S. July 7, 1986).[45] As the City has made the requisite findings, the various restrictions on the

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45 Bowers determined that the state could prohibit certain sexual practices because "prohibitions against [such] conduct have ancient roots," Bowers, 54 U.S.L.W. at 4921, in "Judeo-Christian moral and ethical standards," id. at 4922 (Burger, C.J., concurring). Based on the arguments before it, this Court need not inquire into whether other "prohibitions" that have "ancient roots" also require granting broad powers to states wishing to return to such time-honored values – such as, for example, the value that women may be treated as chattels.

Such a view certainly has "ancient roots." Indeed, the venerable Blackstone noted that at Roman law, a creditor might sell a debtor's wife into slavery to redeem his debts – and that in East India, a creditor is entitled to "violate with impunity the chastity of the debtor's wife." 2 Blackstone's Commentaries 472-73 (1778). The "Judeo-Christian" roots of such a view are, likewise, well-established. See The Bible (Timothy 2:12) ("I suffer not a woman to teach, nor to usurp authority over the man, but to be in silence"); The Koran, ch. 4 ("men have authority over women because Allah has made the one superior to the other . . . for those from whom you fear disobedience, admonish them and send them to beds apart and beat them"); J. Knox, The First Blast of the Trumpet Against the Monstrous Regiment of Women (1558) ("to promote a woman to bear rule . . . is repugnant to nature, contumely to God"). This view was shared by those respected in law; Aristotle found that "women may be said to be an inferior man," and Lord Chesterfield described women as "children of a larger growth."

The law was persistent in defining the domain in which woman could permissibly be present. Myra Bradwell discovered this fact at the hands of the Supreme Court, when it held that Illinois could permissibly prohibit her from practicing law. See Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator"); see also Muller v. Oregon, 208 U.S. 412, 421 (1908) (a "Woman's physical structure [places] her at a disadvantage in the struggle for subsistence"). The law told her not only where she could not be, then, but where she should be. See Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938) ("there is but a twilight zone between a mother's love and the atmosphere of heaven, and . . . no child should be deprived of that maternal influence"); Jenkins v. Jenkins, 173 Wis. 595, 181 N.W. 826, 827 (1921) ("nothing can be an adequate substitute for motherly love"). The attitudes have been persistent. See Hill v. Small Business Admin., 695 F.2d 175, 178 (5th Cir. 1983) ("I don't think any female law clerk is going to give me a lot of input on how to decide a case"); see also Martin, Fathers and Families: Expanding the Familial Rights of Men, 36 Syracuse L. Rev. 1265, 1267 (1986). However, the "outer limits" of Hardwick – like those of the right of privacy itself, see Baker v. Wade, 553 F. Supp. 1121, 1135 (N.D. Tex. 1982) – have not yet been established, so it is too early to tell if centuries-long, western culture objections to rights now held (or sought) by females and others will receive the same analysis and treatment as the right of privacy claims by the homosexual plaintiff in Hardwick. See Hardwick, 54 U.S.L.W. at 4926 nn.4, 5 (Blackmun, J., dissenting) (heterosexual sexual conduct, racial prejudice).

operation, layout, design and furnishing of regulated businesses must be upheld. See Young, 427 U.S. at 56 nn.11-12.

Summary. Only the four subsections described above -- 41A5(a) (8), 41A-5 (c), the "under indictment or information" language of 41A-5 (a) (10), and the five unrelated crimes of 41A-5 (a) (10) -- fail to satisfy the fourth prong of the O'Brien test. The ordinance is thus constitutional, with the above minor exceptions -- which are severable, see section 41A-23 (5), and may be cured by amendment.

IV. Conclusion

Efforts to restrict the accessibility of sexually oriented speech have long been part of Western legal tradition,[46] as has the principle that expression should be free and unfettered.[47] The reconciliation of the competing values implicit in these two long-standing concepts inevitably shifts over time, in response to technological change[48] and evolving conceptions of the legality of legislating majoritarian conceptions of morality.[49]

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46 The first reported obscenity case at common law, Le Roy v. Sir Charles Sidney, 1 Sir. 168, pl. 29 (K.B. 1663), involved Sir Charles, a nude and profane nobleman on a London balcony who spewed an "offensive liquor" upon a crowd -- "the proximate source of the "offensive liquor" appears to have been Sir Charles." Memoirs, 383 U.S. at 428 n.4. Another early case resulted in a finding that the tract "Venus in the Cloister or the Nun in Her Smock" placed the general morality in jeopardy. See Dominus Rex v. Curl, 2 Strange 288, 93 Eng. Rep. 849 (K.B. 1727). Early transplants of the doctrine to this country involved those intending to "deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall." R.V. Hicklin, L.R., 3 Q.B. 360; (1868); see also Ex Parte Jackson, 96 U.S. 727 (1878).

47 See, e.g., Milton, Areopagitica: A speech for the Liberty of Unlicensed Printing 24 (1644); Locke, A Letter Concerning Toleration (1689); Bentham, Fragment on Government (1776); Mill, On Liberty (1859).

48 See Community Television of Utah, Inc. v. Roy, 555 F. Supp. 1164 (1982); Trauth & Huffman, Obscenity and Cable Television: A Regulatory Approach (1986).

49 See, unfortunately, Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (en banc), cert. denied, 54 U.S.L.W. 3863 (U.S. July 7, 1986) (morality justifies prohibiting consensual sodomy); Bowers v. Hardwick, 54 U.S.L.W. 4919 (U.S. June 30, 1986) (same). Accord, Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) (morality justifies limiting expression); Devlin (1979) (moral concensus requisite to societal survival).

Restrictions in the place and manner of sexually oriented expression through zoning regulation is the most recent jurisprudential attempt to allow majority community structure to coexist with minority expression; the sexually oriented business ordinance enacted by the City follows the substantive dictates of this body of law, and must be upheld.

Signed this 12th day of September, 1986.

JERRY BUCHMEYER
United States District Judge

APPENDIX A

CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

SEC. 41A-1.	Purpose and intent.
SEC. 41A-2.	Definitions.
SEC 41A-3.	Classification.
SEC. 41A-4.	License required.
SEC. 41A-5.	Issuance of license.
SEC. 41A-6	Fees.
SEC. 41A-7.	Inspection.
SEC. 41A-8.	Expiration of license.
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SEC. 41A-10.	Revocation.
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SEC. 41A-13.	Location of sexually oriented business.
SEC. 41A-14.	Exemption from location restrictions.
SEC. 41A-15.	Additional regulations for escort agencies.
SEC. 41A-16.	Additional regulations for nude model studios.
SEC. 41A-17.	Additional regulations for adult theaters and adult motion picture theaters.

SEC. 41A-18. Additional regulations for adult motels.
SEC. 41A-19. Regulations pertaining to exhibition of sexually explicit films or videos.
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CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

SEC. 41A-1. PURPOSE AND INTENT

(a) It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

(b) It is the intent of the city council that the locational regulations of Section 41A-13 of this chapter are promulgated pursuant to Article 2372w, Revised Civil Statutes of Texas, as they apply to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the Dallas City Charter and Article 1175, Revised Civil Statutes of Texas. (Ord. 19196)

SEC. 41A-2. DEFINITIONS.

In this chapter:

(1) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."

(2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or

(B) instruments, devices, or paraphernalia which are designed for use in connection with"specified sexual activities."

(3) ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(A) persons who appear in a state of nudity; or

(B) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or

(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:

(A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified

sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(5) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(6) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

(7) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.

(8) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

(9) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.

(10) ESTABLISHMENT means and includes any of the following:

(A) the opening or commencement of any sexually oriented business as a new business;

(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(C) the addition of any sexually oriented business to any other existing sexually oriented business; or

(D) the relocation of any sexually oriented business.

(11) LICENSEE means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.

(12) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(13) NUDITY or a STATE OF NUDITY means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast.

(14) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(15) SEMI-NUDE means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

16) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.

(17) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(18) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.

(19) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:

(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(C) masturbation, actual or simulated; or

(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.

(20) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on June 18, 1986.

(21) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

(A) the sale, lease, or sublease of the business;

(B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

(C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control. (Ord. 19196)

SEC. 41A-3. CLASSIFICATION.

Sexually oriented businesses are classified as follows:

(1) adult arcades;

(2) adult bookstores or adult video stores;

(3) adult cabarets;

(4) adult motels;

(5) adult motion picture theaters;

(6) adult theaters;

(7) escort agencies;

(8) nude model studios; and

(9) sexual encounter centers. (Ord. 19196)

SEC. 41A-4. LICENSE REQUIRED.

(a) A person commits an offense if he operates a sexually oriented business without a valid license, issued by the city for the particular type of business.

(b) An application for a license must be made on a form provided by the chief of police. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches.

Applicants who must comply with Section 41A-19 of this chapter shall submit a diagram meeting the requirements of Section 41A-19.

(c) The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(d) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as applicant. Each applicant must be qualified under Section 41A-5 and each applicant shall be considered a licensee if a license is granted.

(e) The fact that a person possesses a valid theater license, dance hall license, or public house of amusement license does not exempt him from the requirement of obtaining a sexually oriented business license. A person who operates a sexually oriented business and possesses a theater license, public house of amusement license or dance hall license shall comply with the requirements and provisions of this chapter as well as the requirements and provisions of Chapter 46 and Chapter 14 of this code when applicable. (Ord. 19196)

SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, 41A-20.

(10) An applicant or an applicant's spouse has been convicted of or is under indictment or misdemeanor information for a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;

(dd) compelling prostitution;

(ee) obscenity;

(ff) sale, distribution, or display of harmful material to minor.

(gg) sexual performance by a child;

(hh) possession of child pornography;

(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code.

(aa) public lewdness;

(bb) indecent exposure;

(cc) indecency with a child;

(iii) engaging in organized criminal activity as described in Chapter 71 of the Texas Penal Code;

(iv) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

(v) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;

(vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code;

(vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code;

(viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;

(ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor; or

(x) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10), for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction, may qualify for a sexually oriented business license only if the chief of police determines that the

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NO. 87-2051

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

MJR, INC., *et al*,
Petitioners,

vs.

THE CITY OF DALLAS, TEXAS, *et al*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Can a content-neutral ordinance regulating sexually oriented businesses temporarily deny a license to persons recently convicted of specified sex-related crimes?

2. Does *Young v. American Mini-Theatres* require an ordinance regulating the location of sexually oriented businesses to contain a "grandfather clause," thereby exempting existing businesses from its locational restrictions?

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NO. 87-2071

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

MJR, INC., *et al*,

Petitioners,

vs.

THE CITY OF DALLAS, TEXAS, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case substantially and materially misrepresents the facts of this case. Petitioners have stated as matters of fact, without citation to the record, numerous unproven allegations for which there are no findings by the trial court. Among these are the allegations that adult cabarets in Dallas have caused no deleterious effects on neighborhoods (Pet. at 3); the Dallas Ordinance will force every adult cabaret in Dallas to close (Pet. at 4 and 25); and that the areas to which the cabarets may relocate under the Ordinance are industrial zones, poorly lit, with high crime rates, which effectively sentence the cabarets to an "economic death." (Pet. at 5). Petitioners in a number of

instances have misrepresented the findings of the District Court and have injected new facts not in the record.[1]

Respondents will not engage in a point-by-point debate with Petitioners in this matter. Instead, Respondents refer the Court to the history of the case as set forth in the lower court opinions[2] and supplement same with the following statement of the case.

After considering the studies of other metropolitan cities on the effects of sexually oriented businesses upon neighborhoods, as well as its own crime rate study, the City of Dallas enacted a Sexually Oriented Business Ordinance, codified as Chapter 41A of the Dallas City Code. The ordinance regulates sexually oriented businesses in two basic ways: zoning restrictions and a license requirement.

The zoning provisions prohibit such businesses from locating within 1000 feet of a church, school, residential area, public park adjacent to a residential area, or another sexually oriented business. Businesses located within 1000 feet of one of the prohibited areas are given a three-year amortization period if they were already operating on the effective date of the Ordinance. Section 41A-13, Dallas City Code.

The licensing provisions require a license to be obtained by those establishments meeting the Ordinance's definition of a "sexually oriented business." Sections 41A-4 and 41A-2, Dallas City Code. A license is not available to persons recently convicted of certain sex-related crimes. However, an individual convicted of those crimes may again become eligible for a license two years after the date of conviction or

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[1]See for example, Pet. at 29, nn. 20-22.

[2]*Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D. Tex. 1986), and *FW/PBS v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988).

end of confinement, whichever is later. In the case of convictions for felonies or multiple misdemeanors, the waiting period is five years. Section 41A-5, Dallas City Code.

Immediately after passage of the Ordinance, a variety of adult entertainment establishments attacked its constitutionality in three separate federal suits, one of which was brought by Petitioners. Petitioners in this case are a group of topless bars, classified by the Ordinance as "adult cabarets." Each of the suits sought declaratory and injunctive relief. The suits were consolidated, and the case was submitted for decision on cross-motions for summary judgment filed by all parties. No party objected to resolution of the issues by summary judgment.[3]

The District Court upheld the constitutionality of the Ordinance, with the exception of four relatively minor provisions dealing with licensing. These sections were later amended or deleted to comport with the Court's ruling.[4]

The District Court made a number of findings which are pertinent to this Petition for Certiorari. First, the Court found that the Ordinance was content-neutral, focusing on the secondary effects of sexually oriented businesses and having only an incidental impact on protected speech, and that it satisfied the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). Second, the Court found that the land available for the relocation of existing businesses and the establishment of new businesses was substantial, constituting 8-10% of the City's total area.[5] The Court

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[3]See *FW/PBS v. City of Dallas*, 837 F.2d 1298, 1303 (5th Cir. 1988), and *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1064 n. 5, and 1068 n. 17 (N.D. Tex. 1986).

[4]See Ordinance 19377, enacted October 12, 1986, included herein as Appendix A.

[5]*Dumas v. City of Dallas*, 648 F.Supp. 1061, 1070-71 (N.D. Tex. 1986). Petitioners inaccurately state that the District Court found "slightly more than 8%" of the City to be available. Pet. at 25.

further found that the Ordinance's three-year amortization period was generous and constituted ". . . a valid mechanism used to enforce valid locational regulations."[6]

Regarding the licensing provisions, the District Court found that the requirement of a license for sexually oriented businesses is constitutional, and that the denial of licenses to persons convicted of specified sex-related crimes is reasonably related to the crime-control intent of the Ordinance[7] and is consistent with *Arcara v. Cloud Books, Inc.*, 478 U.S. _____, 106 S.Ct. 3175 (1986). Last, the Court held that the Ordinance provides procedural due process of law and satisfies the standard of *Freedman v. Maryland*, 380 U.S. 51 (1965).

The Fifth Circuit upheld the District Court decision in all respects. The Court disagreed, however, that a content-neutral regulation such as the Dallas Ordinance must meet the *Freedman* standard of due process. Instead, the Court found that the Ordinance, being content-neutral, need only meet the standards applicable to time, place, and manner regulations and that it did so.[8]

The Fifth Circuit agreed that the Ordinance's use of criminal convictions to deny licensing for a limited period of time is constitutional. The Court found that ineligibility results only from the recent commission of sex-related crimes and that the City had demonstrated a substantial relationship between the conviction and the evil to be regulated. The Court stated additionally that the Ordinance in this regard might well meet a strict scrutiny test as well as a substantial relationship test.[9]

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[6] *Id.* at 1071.

[7] *Id.* at 1071, 1073-74.

[8] *FW/PBS v. City of Dallas*, 837 F.2d 1298, 1301-1303 (5th Cir. 1988).

[9] *Id.* at 1304-1305.

Finally, the Court held that the District Court had before it sufficient evidence to conclude that the Ordinance allows adequate alternative sites for the relocation of sexually oriented businesses.[10]

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. THE REGULATORY PROVISIONS OF THE ORDINANCE ARE CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

A. The Fifth Circuit and District Court Correctly Held That Temporary Denial of a Sexually Oriented Business License to Persons Recently Convicted of Specified Sex-Related Crimes Does Not Violate the Constitution and is Consistent with This Court's Decisions in *Arcara v. Cloud Books, Inc.* and *City of Renton v. Playtime Theatres, Inc.*

Petitioners assert that the provisions of the Ordinance allowing denial of a license to a person with certain specified convictions act as a prior restraint on expression. This contention was correctly rejected by both the Fifth Circuit[11] and the District Court.[12]

In *City of Renton v. Playtime Theatres, Inc.*,[13] this Court faced a zoning ordinance similar to the Dallas ordinance. The Court in upholding the *Renton* ordinance tested the ordinance under the time, place, or manner analysis reserved for content-neutral regulations, even though the Ordinance clearly marked businesses according to the content of their products.

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[10] *Id.* at 1303.

[11] *FW/PBS v. City of Dallas*, 837 F.2d at 1304-05.

[12] *Dumas v. City of Dallas*, 648 F.Supp. at 1073-74.

[13] 475 U.S. 41 (1986).

This Court gave two reasons for applying the time, place, or manner analysis. First, the ordinance could be treated as content-neutral because its purpose was not to suppress speech of a particular content, but to control the *effects* of certain businesses on the urban environment. As long as the City's predominant concern was to curb the secondary effects of adult businesses on neighborhoods, the ordinance could distinguish between types of businesses without engaging in content-based regulation.

Second, this Court affirmed that sexually oriented materials are entitled to less First Amendment protection than other forms of protected expression. The plurality opinion in *Young v. American Mini-Theatres* had stated this idea in recognizing that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . ." *City of Renton*, 106 S.Ct. at 929-30, quoting *Young*, 427 U.S. at 70.

The Fifth Circuit recognized that this reasoning applies with equal force to the Dallas ordinance. The type of activity regulated is the same as in *City of Renton*, and there was abundant evidence that the predominant concern of the Dallas City Council in enacting the Ordinance was to limit the secondary effects of sexually oriented businesses and not the content of their products.

Accordingly, the Fifth Circuit held that as a content-neutral regulation, the Dallas Ordinance — *including* the details of its *licensing* scheme — should be judged under a "time, place, and manner" analysis in accordance with *Young v. American Mini-Theatres* and *City of Renton*. As the Court noted, the "time, place, and manner" standard cannot be limited solely to regulation of "place." Therefore, the regulations of the Ordinance are constitutional if they are

narrowly tailored to serve a substantial governmental interest while leaving open alternative channels of communication.[14]

Use of Criminal Convictions

The Dallas ordinance, including its criminal convictions disability, clearly meets this test. First, by limiting the disability to specified crimes that are sexual in nature, the Ordinance exhibits a substantial relationship between the conviction on which denial is based and the evil sought to be prevented. Indeed, the Fifth Circuit found that the Ordinance might well meet a strict scrutiny standard as well as the substantial relationship test. *FW/PBS v. City of Dallas*, 837 F.2d at 1304-05. The City Council's objective in enacting the Ordinance was to ameliorate the effects of sexually oriented businesses on neighborhoods — including the prevention of *crime*. By its use of sex-related crimes as an occupational disability, the Ordinance is "narrowly tailored to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome."[15]

Second, Petitioners overlook the importance of this Court's ruling in *Arcara v. Cloud Books, Inc.*, 478 U.S.___, 106 S.Ct. 3175, 92 L.Ed.2d 568 (1986). In *Arcara*, this Court upheld a New York law permitting closure of a sexually oriented bookstore for one year because of acts of prostitution and public lewdness occurring on the premises with the knowledge of management. As in *Arcara*, the crimes listed in the Dallas Ordinance as a basis for denying licensure (prostitution, public lewdness, sexual assault, etc.) manifest "no element of protected expression" under the First

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[14] *SDJ, Inc. v City of Houston*, 837 F.2d 1268, 1273 (5th Cir. 1988).

[15] *Dumas v. City of Dallas*, 648 F.Supp. at 1074 n. 34.

Amendment. *Arcara*, 106 S.Ct. at 3176-77. As such, they may be used to deny licensure.[16] If criminal conduct will permit closure of an adult business, it follows that one who has recently been convicted of a sex-related crime may for a time be denied a license to operate a sexually oriented business.[17]

Additionally, it must be stressed that the Dallas ordinance permits the licensing of former offenders after the passage of a specified amount of time.[18] For example, a person convicted of Promotion of Obscenity, a misdemeanor under Texas law,[19] may receive a license two years after his date of conviction or end of confinement, whichever is later, under the terms of the Ordinance. Just as the New York law in *Arcara* permitted the closure of a business for one year based upon criminal conduct, the Dallas ordinance withholds licensing for certain sex-related offenses for a limited period of time. The Dallas ordinance is consistent with *Arcara*.

Petitioners cite *Near v. Minnesota*, 283 U.S. 697 (1931), as conflicting with the Fifth Circuit decision in this case. In *Near* the challenged regulation permitted the state to permanently enjoin the publication of any newspaper believed to be publishing "obscene, lewd, lascivious, malicious, scandalous, or defamatory" material. The statute required no prior judicial determination of these issues. The law was clearly content-based and constituted a permanent

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[16]The crime of Obscenity also involves no protected expression under the First Amendment. *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973).

[17]*Dumas v. City of Dallas*, 648 F.Supp. at 1074 n. 34.

[18]Section 41A-5(c), as amended by Ordinance 19377, Appendix A of this Brief.

[19]Section 43.23, Texas Penal Code.

suppression of speech. *Contra*, the Dallas Ordinance is content-neutral, and its denial of a sexually oriented business license to those convicted of sexually oriented crimes is but a temporary occupational disability. It does not bar the exhibition of any particular film or book, and it is not directed at future expression, unlike the cases cited by Petitioners. It merely acts as a short-term disability of particular persons to enter into or continue in an occupation heavily regulated by government. As Judge Higginbotham noted in his opinion for the Fifth Circuit, it is an accepted principle of the police power that "the government may attach to criminal convictions disabilities aimed at preventing recidivism." *FW/PBS v. City of Dallas*, 837 F.2d at 1305, citing *inter alia DeVeau v. Braisted*, 363 U.S. 144, 155-59 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas").

The other cases cited by Petitioners are pre-*Arcara* cases involving content-based regulations directed specifically toward the exhibition of protected materials — unlike the *content-neutral* Dallas Ordinance — and, as such, are either inapplicable or distinguishable.[20]

In addition to this Court's ruling in *Arcara*, numerous lower court decisions have upheld the use of rationally-related criminal convictions to deny or revoke sexually oriented business occupational licenses, including two cases

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[20]For example, Petitioners cite *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986), *cert. denied* 107 S.Ct. 316 (1986). In that case a license could be revoked upon the administrative finding of a Board that an allegedly obscene film had been shown. *Contra*, the Dallas Ordinance requires a judicial finding of obscenity through its requirement of a court conviction.

in which this Court denied certiorari.[21] The Ordinance's limited use of criminal convictions is narrowly tailored to further a substantial governmental interest and is consistent with this Court's rulings in *Arcara* and *City of Renton*.

B. The Lower Courts' Rulings That Sexually Oriented Businesses May Be Subject to a License Requirement is Consistent with *Young v. American Mini-Theatres* and *City of Renton*.

In *City of Renton, supra*, this Court held that content-neutral ordinances having an incidental impact on free expression may be analyzed under a time, place, and manner standard of review.[22] The Fifth Circuit in the instant case accordingly applied this standard of review and found that the regulatory provisions of the Ordinance are reasonable and are not unduly burdensome under the First Amendment.

In *Young v. American Mini-Theatres, supra*, this Court noted that even in the area of protected expression, a difference in content may invoke a different governmental response.[23] Although the impetus for a law may be the type of content communicated by targeted businesses, the government may permissibly tailor its reaction to different

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[21] *106 Forsyth Corp. v. Bishop*, 482 F.2d 280 (5th Cir. 1973), *cert. denied* 422 U.S. 1044 (1975); *Airport Bookstore, Inc. v. Jackson*, 248 S.E.2d 623 (Ga. 1978), *cert. denied sub nom. Gateway Books v. Jackson*, 441 U.S. 952 (1979).

For similar decisions see *Chulchian v. City of Indianapolis*, 633 F.2d 27 (7th Cir. 1980); *Broadway Books v. Roberts*, 642 F.Supp. 486 (E.D. Tenn. 1986); *Borrago v. City of Louisville*, 456 F.Supp. 30, 32 (W.D. Ky. 1978); *West Gallery Corp. v. Salt Lake City Board of Commissioners*, 586 P.2d 429 (Utah 1978).

[22] *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. at 927.

[23] *Young v. American Mini-Theatres*, 427 U.S. at 66.

messages according to the degree to which its interests are implicated. *Young*, 427 U.S. at 82 n. 6 (1976) (Powell, J., concurring).

Accordingly, the Dallas Ordinance has imposed reasonable time, place, and manner regulations which, although directed at businesses of a particular nature (some but not all of which engage in First Amendment activities), constitute a legitimate governmental response to the problems generated by such businesses.

Petitioners challenge the City's authority to impose a licensing requirement. The concept of licensing sexually oriented businesses, including adult cabarets, has been upheld against First Amendment and prior restraint challenges.[24] Indeed, this Court in *Young* upheld a Detroit ordinance which included adult cabarets among the "regulated uses" subject to licensing and zoning regulations. *Young v. American Mini-Theatres, Inc.*, 427 U.S. at 52 n.3 (1976). Licensing is a valid method of identifying sexually oriented businesses and ensuring that they abide by the locational and other restrictions of the City's ordinance.[25] Topless bars may be as subject to licensing as theaters and other types of businesses. *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986), affirmed at 837 F.2d 1268 (5th Cir. 1988).

The fact that an ordinance applies to businesses of a particular type does not make it a content-based regulation, as this Court so stated in *Young* and *City of Renton*. The Dallas Ordinance is a valid legislative decision by the Dallas

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[24] *Walt Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1171 (4th Cir. 1986); *FW/PBS v. City of Dallas, supra*; *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

[25] *Genusa v. City of Peoria*, 619 F.2d 1203, 1212 (7th Cir. 1980); *Dumas v. City of Dallas*, 648 F.Supp. at 1071 n.26 (N.D. Tex. 1986).

City Council to treat sexually oriented businesses differently because they have "markedly different effects upon their surroundings." *Young*, 427 U.S. at 82 n.6 (Powell, J., concurring). The Dallas licensing regulations are reasonable under the time, place, and manner test and are not in conflict with any decision of this Court.

C. The Fifth Circuit and District Court Correctly Held That the Ordinance Provides Adequate Procedural Safeguards and is Consistent With the Decisions of This Court.

Both the District Court and Fifth Circuit found that the Ordinance provides adequate procedural safeguards which prevent the licensing requirements from acting as a prior restraint on speech. Petitioners, however, persist in the argument that the Ordinance constitutes a prior restraint.

Petitioners assert that the Ordinance is governed by and fails to meet the standards of *Freedman v. Maryland*, 380 U.S. 51 (1965). However, as was held by the Fifth Circuit, the *Freedman* standard is inapplicable to a content-neutral regulation such as the Dallas ordinance.[36] The Court noted that after the *City of Renton* decision, a content-neutral ordinance which regulates the *effects* of sexually oriented businesses without engaging in content-based regulation ". . . need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content." *FW/PBS v. City of Dallas*, 837 F.2d at 1306.

And as the Fifth Circuit correctly pointed out, the First Amendment protection required for political or religious activities, such as those involved in *Fernandes v. Limmer*,[37]

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[36]*Accord, Bayside Enterprises, Inc. v. Carson*, 470 F.Supp. 1140, 1149 (M.D. Fla. 1979).

[37]663 F.2d 619 (5th Cir. 1981), *cert. dismissed* 458 U.S. 1224 (1982).

"... is of a different order than the protection due sexually oriented businesses. * * * What is being limited here is not a particular movie — as in *Freedman* — nor episodic solicitation efforts — as in *Fernandes* — but a long-term commercial business." *FW/PBS v. City of Dallas, id.* at 1303.

The cases cited by Petitioners in support of their *Freedman* argument are easily distinguishable. Each of them involves content-based regulations involving a direct impact on the suppression of speech. The regulations involved in *City of Paducah v. Investment Entertainment*[28] and *Entertainment Concepts, Inc. v. Maciejewski*[29] were local obscenity ordinances which called upon a city board to review particular films and make administrative findings of obscenity. In *Freedman v. Maryland*, the Maryland statute at issue actually required the films themselves to be licensed and directed the Board of Censors to deny licensure to films deemed to be "obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals . . ." *Freedman v. Maryland*, 380 U.S. 51, 52 n. 2 (1965). The Dallas Ordinance, as stated, is a content-neutral regulation directed at curbing secondary effects and not the content of expression itself.

It should be remembered that even if this Court believes that the *Freedman* standard applies to the Dallas ordinance, the District Court below found that *Freedman* was satisfied,[30] holding that

> "The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable

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[28] 791 F.2d 463 (6th Cir. 1986), *cert. denied* 93 L.Ed.2d 290 (1986).

[29] 631 F.2nd 497 (7th Cr. 1980), *cert. denied* 40 U.S. 919 (1981).

[30] As the District Court noted, 648 F.Supp. at 1075, prompt judicial review of an adverse licensing decision is available to any party in addition to the Ordinance's administrative appeal procedures. Restraining orders (Chapter 65, TEX.CIV.PRAC. & REM. CODE) and writs of mandamus are among the remedies available under Texas law.

standards, and comport with *Freedman* and fundamental tenets of due process." *Dumas v. City of Dallas*, 648 F.Supp. at 1075.

II. THE ZONING PROVISIONS OF THE ORDINANCE ARE GOVERNED SQUARELY BY *CITY OF RENTON*.

A. Petitioners' Arguments Concerning The Adequacy of Alternative Sites Are In Reality Arguments of Economic Desirability, an Issue Squarely Controlled by *City of Renton*.

Section 41A-13 of the Ordinance prohibits sexually oriented businesses from locating within 1000 feet of churches, schools, residential areas, parks adjacent to residential areas, and other sexually oriented businesses. Businesses existing prior to the enactment of the Ordinance which violate the location restrictions are declared nonconforming uses and are given three years in which to relocate.[31]

Before enacting the Ordinance, both the Planning Commission and the Dallas City Council separately found, based upon the evidence presented to them, that the Ordinance provides adequate alternative sites for relocation. The District Court gave deference to the City Council findings (TR. at 154) but also found them to be fully supported by the evidence presented upon cross-motions for summary judgment by both Plaintiffs and Defendants. See City's Exhibit Nos. 15 and 27 and Plaintiff's Exhibit Nos. 1, 3, 4, and 7 referred to in *Dumas v. City of Dallas*, 648 F.Supp. at 1071.

Petitioners insist that the District Court failed to adequately assess the impact of the Ordinance on cabarets, and that the Ordinance fails to leave sufficient locations for

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[31]Section 41A-13, Dallas City Code.

existing businesses. This conclusion is unsupported by the record.

The District Court fully considered the evidence and arguments of Petitioners and found them, at best, to speak only to economic desirability. See *Dumas v. City of Dallas*, 648 F.Supp. at 1071, nn. 23-24. In his oral remarks accompanying the release of the written opinion, the District Court stated as follows:

> ... basically the arguments that the ... Plaintiffs are making, like those which are understandably made in other cases involving sexually oriented business ordinances, are that the sites are not desirable for business locations, that they're not economic. And I would reach that conclusion even though arguments made yesterday, and in the briefs, are phrased in terms of impossibility to operate. And I still think all — regardless of the terms used or the rubric used, that the basic difference between the City's evidence and that of the [Plaintiffs] is *whether the locations would be desirable, whether they would be economic*. TR. at 155 (emphasis added).

This Court held in *City of Renton* that the test of an ordinance of this type is not whether it provides sites which are commercially attractive, but whether it permits a "reasonable opportunity" for affected businesses to locate within the City. *City of Renton*, 106 S.Ct. at 932. The District Court in the instant case found that the Ordinance did so.

As stated previously, the case was submitted for decision, without objection, upon cross-motions for summary judgment and the record made in support thereof.[31] The District Court found that approximately *eight to ten* percent of the city's total area (21,000 acres) was available for the location

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[31] *See FW/PBS v. City of Dallas*, 837 F.2d at 1303, and *Dumas v. City of Dallas*, 648 F.Supp. at 1064 n. 5, and 1068 n. 17.

of sexually oriented businesses;[33] that the available areas stretched from the inner city area to the north and south suburbs; and that the alternative sites were feasible locations for such businesses.[34] The Court concluded that the Ordinance permits "reasonable alternative avenues of communication" and satisfies *Basiardanes v. City of Galveston*[35] and *City of Renton*. The Fifth Circuit held that the District Court had evidence before it sufficient to sustain its findings.[36]

It is evident that in making its findings the District Court considered all of the evidence and found that the City's evidence proved that adequate alternative sites exist as a matter of law and that Petitioners' evidence spoke only to economic desirability of the available areas. Petitioners did not move to re-open the evidence following this adverse decision. The record supports the findings of the District Court, and Petitioners are bound by that record. Petitioners may not now ask this Court to disregard an evidentiary issue which was resolved against them by the trial court. The case is squarely controlled by *City of Renton*.

B. Locational Restrictions May Constitutionally Be Applied to Existing Sexually Oriented Businesses When a Reasonable Amortization Period is Provided.

Petitioners seem to suggest that because the Detroit ordinance in *Young v. American Mini-Theatres* applied only to the location of future businesses, it created a constitutional right to a grandfather clause in all sexually oriented business ordinances. Petitioners have missed the point of *Young* In *Young* the pivotal issue was not whether one or more

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[33]Compare *City of Renton, supra* (five percent).

[34]*Dumas v. City of Dallas*, 648 F.Supp. at 1070-71.

[35]682 F.2d 1203 (5th Cir. 1982).

[36]*FW/PBS v. City of Dallas*, 837 F.2d at 1303.

existing businesses would have to move, but whether the ordinance as enacted would have the effect of greatly restricting the public access to protected materials. *Young* created no constitutional right of a business to remain at a location for as long as it chooses; it merely protected the access of the public to sexual materials protected by the First Amendment.

Although the Dallas Ordinance does not grandfather non-conforming uses, it does provide them with a three-year amortization period[37] and an exemption procedure.[38] Such amortization provisions have uniformly been upheld, and the three-year period allowed by the City of Dallas is unusually generous.[39]

In asserting that an ordinance may not require the relocation of existing sexually oriented businesses, Petitioners cite *Adultworld Bookstore v. City of Fresno*, 738 F.2d 1348 (9th Cir. 1985), wherein the Ninth Circuit stated:

> There are apparently no appellate cases since *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), which have upheld the constitutionality of an ordinance which requires the relocation of existing adult-type businesses. 758 F.2d 1348, 1351.

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[37]Section 41A-13(f), Dallas City Code.

[38]The exemption provision (Section 41A-14) permits applicants whose licenses were denied for zoning reasons to apply for an exemption from the locational restrictions. *See Young v. American Mini-Theatres*, 427 U.S. at 54 n. 7, and 56 (1976).

[39]*See Hart Bookstores v. Edmisten*, 612 F.2d 821, 830 (4th Cir. 1979), *cert. denied* 447 U.S. 929 (1980) (upholding six-month amortization period); *Northend Cinema, Inc. v. Seattle*, 585 P.2d 1159, 1160 (Wash. 1970), *cert. denied sub nom. Apple Theatre v. Seattle*, 441 U.S. 946 (1970) (upholding three-month amortization period).

See also *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359, 1370-71 (S.D. Tex. 1986), affirmed at 837 F.2d 1268 (5th Cir. 1988) (six-month amortization period); and Note, *Using Constitutional Zoning to Neutralize Adult Entertainment - Detroit to New York*, 5 Fordham Urban L.J. 455, 472-74 (1977) (advocating one-year amortization period).

Respondents respectfully submit that the Ninth Circuit was incorrect. At the time the above statement was made, at least two such appellate cases after *Young* had been decided, and this Court denied certiorari in both.

In *Hart Book Stores v. Edmisten*, 612 F.2d 812 (4th Cir. 1979), the Fourth Circuit upheld a North Carolina statute with a six-month amortization period. This Court denied certiorari at 447 U.S. 929 (1980). And in *Northend Cinema v. City of Seattle*, 585 P.2d 1153 (Wash. 1978), a Seattle ordinance was upheld with a 90-day amortization period. Certiorari was denied *sub nom. Apple Theatre v. City of Seattle* at 441 U.S. 946 (1979).

The use of an amortization provision is a reasonable alternative to a grandfather clause, *SDJ, Inc. v. City of Houston*, 636 F.Supp. at 1370-71 (S.D. Tex. 1986), affirmed at 837 F.2d 1268 (5th Cir. 1988), and is but another application of traditional zoning principles to adult businesses. In *City of Renton*, this Court noted that cities may vary in the methods chosen to further the substantial interest in regulating these businesses. *City of Renton*, 89 L.Ed.2d at 41. While Detroit dispersed adult businesses, the City of Renton concentrated them. Similarly, while Detroit grandfathered existing businesses, the City of Dallas may choose to amortize them and require them to relocate within a reasonable period. So long as the Ordinance does not "unreasonably limit alternative avenues of communication," *Young* is satisfied.

C. A City May Rely Upon the Experience of Other Cities in Dealing With the Secondary Effects of Adult Cabarets, A Principle Clearly Decided in *City of Renton*.

Petitioners ask this Court to rule that a city, in enacting an ordinance regulating existing sexually oriented businesses, "[m]ust demonstrate that the business is causing, or contributing to, adverse secondary effects." Pet. at 25. Thus, Petitioners would hold that before a city may act to ameliorate the secondary effects of adult businesses, it must not only conduct its own independent study, it must conduct *separate* studies for *each* affected business to show how each business is contributing to the secondary effects.

Petitioners' argument is controlled squarely by *City of Renton*. This Court rejected the notion that a city must conduct its own studies before enacting an ordinance, stating:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies on is *reasonably believed to be relevant* to the problem that the city addresses. *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 89 L.Ed.2d at 40 (1986) (emphasis added).

Petitioners would deny the City the right to rely upon the experience and studies of other cities, in contravention of *City of Renton*, and would require the City to "await deterioration in order to act." *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980).

Petitioners' complaint that the City Council of Dallas relied upon insufficient evidence in adopting the Ordinance was squarely rejected by the District Court. The District Court stated as follows:

> Plaintiffs make the general objection that the Ordinance cannot be directed to adult cabarets at all, claiming that a "paucity" of evidence concerning such establishments was considered by the City. This is incorrect, as both major studies considered - those from Austin and Indianapolis - concerned topless bars. Moreover, any consideration of the Ordinance and the discussion surrounding it, as a whole, reveals that the City did indeed consider topless bars part of the condition the Ordinance seeks to ameliorate; the City may permissibly include adult cabarets in the Ordinance. *Dumas v. City of Dallas*, 648 F.Supp. at 1076 n.43 (N.D. Tex. 1986).

A number of studies by other cities have shown that topless bars contribute to the secondary effects generated by adult businesses,[40] and the City of Dallas was entitled to rely upon the studies which it "reasonably believed to be relevant to the problem" that it addressed. *City of Renton*, 89 L.Ed.2d at 40. Petitioners arguments are clearly controlled by *City of Renton* and furnish no basis for issuance of a writ of certiorari.

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[40]See, for example, the Houston study mentioned in *SDJ, Inc. v. City of Houston*, 636 F.Supp. at 1364-65 (S.D. Tex. 1986), affirmed at 837 F.2d 1268 (5th Cir. 1988).

CONCLUSION

The decision of the Fifth Circuit Court of Appeals is in harmony with this Court's decisions in *Young, City of Renton* and *Arcara*. This Court should deny the Petition for Writ of Certiorari.

Date: July 12, 1988

Respectfully submitted,

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APPENDIX A

ORDINANCE NO. 19377

An ordinance amending Sections 41A-2, 41A-5, 41A-7, 41A-10, and 41A-13 of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended; amending definitions; adding definitions of "residential district" and "residential use"; amending provisions dealing with the issuance of licenses for sexually oriented businesses; amending inspection provisions; amending revocation provisions; providing a penalty not to exceed $1,000; providing a saving clause; providing a severability clause; and providing an effective date.

WHEREAS, the city plan commission and the city council, in accordance with the provisions of state law and the applicable ordinances of the city, have given the required notices and have held the required public hearings regarding this amendment to CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended; and

WHEREAS, on June 18, 1986, the city council passed Ordinance No. 19196, which amended the Dallas City Code, as amended, by adding Chapter 41A, "SEXUALLY ORIENTED BUSINESSES"; and

WHEREAS, on August 6, 1986, the city council adopted Resolution No. 86-2453, clarifying certain definitions in Ordinance No. 19196; and

WHEREAS, Section 3 of Resolution No. 86-2453 directed the city attorney to draft an ordinance amending Section 41A-13(a) of the city code in a manner consistent with the intent expressed in Resolution No. 86-2453; and

WHEREAS, the city attorney has drafted this ordinance in accordance with the directive of Resolution No. 86-2453; and

WHEREAS, the city attorney has further advised that enforcement of Ordinance No. 19196 can be enhanced by amending certain of its provisions dealing with issuance and revocation at licenses and inspection provisions relating to sexually oriented businesses; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Subsection (13) of Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended to read as follows:

"(13) NUDITY or a STATE OF NUDITY means:

(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast, *or*

(B) a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast."

SECTION 2. That Subsections (15) through (21) of Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, are hereby renumbered as Subsections (17) through (23) respectively.

SECTION 3. That Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding new Subsections (15) and (16) to read as follows:

"(15) RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family or mobile home zoning district as defined in the Dallas Development Code.

(16) RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as defined in the Dallas Development Code."

SECTION 4. That Section 41A-5, "Issuance of License," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended is amended to read as follows:

"SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding manage a sexually oriented business premises in a peaceful and law-abiding manner, *thus necessitating action by law enforcement officers.*

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19 or 41A-20.

(10) An applicant or an applicant's spouse has been convicted of [~~or is under indictment or misdemeanor information for~~] a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;

(dd) compelling prostitution;

(ee) obscenity;

(ff) sale, distribution, or display of harmful material to minor;

(gg) sexual performance by a child;

(hh) possession of child pornography;

(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:

(aa) public lewdness;

(bb) indecent exposure;

(cc) indecency with a child;

~~[(iii) engaged in organized criminal activity as described in Chapter 71 of the Texas Penal Code;]~~

(iii) ~~[(iv)]~~ sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

(iv) ~~[(v)]~~ incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;

~~[(vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code;~~

~~(vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code;~~

~~(viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;~~

~~(ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor;~~] or

(v) [~~(x)~~] criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10)[~~, for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction,~~] may qualify for a sexually oriented business license only *when the time period required by Section 41A-5(a)(10)(B) has elapsed.* [~~if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction:~~

~~(1) the extent and nature of his past criminal activity;~~

~~(2) his age at the time of the commission of the crime;~~

~~(3) the amount of time that has elapsed since his last criminal activity;~~

~~(4) his conduct and work activity prior to and following the criminal activity;~~

~~(5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and~~

~~(6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.~~

~~(d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under subsection (c) of this section.~~]

(d) [~~(c)~~] The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time."

SECTION 5. That Section 41A-7, "Inspection," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding a new Subsection (e), to read as follows:

"(c) The provisions of this section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation."

SECTION 6. That Subsections (d) and (e) of Section 41A-10, "Revocation," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, are amended to read as follows:

"(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license *unless the licensee or employee knowingly allowed the act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in a public place or within public view.*

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed [~~since the termination of any sentence, parole, or probation~~]."

SECTION 7. That Subsection (a) of Section 41A-13, "Location of Sexually Oriented Businesses," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended to read as follows:

"(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

(1) a church;

(2) a public or private elementary or secondary school;

(3) a boundary of a residential district as defined *in this chapter* [~~by the Dallas Development Code~~];

(4) a public park adjacent to a residential district as defined *in this chapter* [~~by the Dallas Development Code~~]; or

(5) the property line of a lot devoted to *a* residential use *as defined in this chapter.*"

SECTION 8. That a person violating a provision of this ordinance, upon conviction, is punishable by a fine not to exceed $1,000.

SECTION 9. That CHAPTER 41A of the Dallas City Code, as amended, shall remain in full force and effect, save and except as amended by this ordinance.

SECTION 10. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

SECTION 11. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordered.

October 12, 1986

Supreme Court, U.S.
FILED
SEP 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2051

In The

Supreme Court of the United States

October Term, 1987

M.J.R., INC., et al.,
Petitioners,

v.

CITY OF DALLAS,
Respondent.

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Is an ordinance which prohibits the operation of a lawful business which presents sexually oriented, nonobscene entertainment, by any person who has been previously convicted of an obscenity offense or certain other crimes, or whose spouse has been so convicted, an unlawful prior restraint, as condemned in *Near v. Minnesota*, 283 U.S. 697 (1931) and as suggested in *Arcadia v. Cloud Books, Inc.*, 478 U.S. 697 (1986(?

2. Is a municipal ordinance which requires a license before one may engage in protected expression, and whivch fails to provide the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965) after denial or revocation of a license, an unlawful prior restraint?

3. Is a zoning ordinance which forces the closure of 100% of a city's adult cabarets, and 92% of all adult businesses, subject to strict scrutiny under *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), or to the deferential standard of review allowed for prospective zoning regulations in *City of Renton v. Playtine Theaters, Inc.*, 475 U.S. 41 (1986)?

4. Does an ordinance restricting adult cabarets to mostly industrial, poorly lit, unsafe areas where economic survival is virtually impossible, thus drastically reducing the number of adult cabarets, violate the requirement of *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) that a

city must refrain from denying such businesses a reasonable opportunity to open and operate?

5. May a city, through zoning, close every adult cabaret in the city, even though they had been operating lawfully for many years while causing no adverse secondary effects, or must the ordinance apply to new businesses only, as indicated in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)?

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REASONS WHY THE WRIT SHOULD BE GRANTED

Respondent[1] begins its Brief in Opposition with the following statements:

> Petitioners' statement of the case substantially and materially misrepresents the facts of this case. Petitioners have stated as matters of fact, without citation to the record, numerous unproven allegations for which there are no findings by the trial court.

Respondent then identifies facts which it claims are misrepresentations: 1) that the adult cabarets in Dallas have caused no deleterious effects on neighborhoods; 2) that the Dallas ordinance will force every adult cabaret to close; and 3) that the areas available to adult cabarets are so poor as to make it impossible for more than a few of these businesses to survive. Respondent does not cite to anything in the record below that would establish any misrepresentation, nor does Respondent claim that the facts alleged by Plaintiff are incorrect. Respondent only claims that the record has been misrepresented.

As this Court said in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984):

> . . . in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to

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[1] These Petitioners sued only the City of Dallas in the trial court, and did not name any other party as a respondent in this Court. Accordingly, Petitioners believe the City of Dallas is the only Respondent in this case.

> make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." [Citatations omitted].

Therefore, the trial court's failure to make certain factual findings does not affect an appellate court's obligation to examine the entire record. That record includes the transcripts of the hearings before the City Plan Commission (Defendant's Exhibit 1 in the trial court) and the City Council (Defendant's Exhibit 17). This is the only record before the Dallas city government to support the enactment of an ordinance which impacts significantly on rights which are guaranteed by the First Amendment.

The Plan Commission transcript is 60 pages long, and there is not a single mention of adult cabarets. No witness, no Commissioner, no Council member, no one suggested that any adult cabaret in the city had ever caused any deleterious effects. The trial court made no finding that they had caused any problems. In fact, the court pointed out the lack of such evidence to the City.[2] The City did not claim any such evidence existed, nor disagree with the court's observation that there was no evidence in the record, but instead responded by saying that it had looked at the Austin, Indianapolis and Los Angeles studies for evidence of negative impact of adult cabarets.[3] Thus, Petitioners have not misrepresented the record

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2 The trial court's statements appear on p. 132 of the transcript of the hearing on cross-motions for summary judgment.

3 This representation to the trial court was inaccurate, and is the only basis in the record for the statement of the District Court, 648 F. Supp. at 1064, and the Court of Appeals, 837 F.2d at 1300, that the City examined studies done by

in stating that there is no evidence that adult cabarets have caused any deleterious effects in Dallas.

Secondly, the evidence in the trial court was overwhelming that the vast majority of locations left available for adult businesses were in primarily industrial zones, with high crime rates, unlit and unsafe streets, and no retail activity. The trial court even acknowledged, in the hearing on cross-motions for summary judgment, that the female customers of one Petititioner would not be willing to travel to those locations at night, thus probably dooming that business to bankruptcy.[4]

The City presented evidence that a few of the available locations were in good retail areas, suitable for nightclubs. The City has never claimed that there would not be drastic reduction, or even complete elimination, of adult cabarets as a result of the ordinance. The City has never challenged the claim that approximately 110 of the 120 adult businesses in Dallas would have to close.[5] The Petitioners argued that the

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other communities.

As the record below clearly shows, in the words of the City Attorney speaking to the Plan Commission (Defendant's Exhibit 17, at p. 3), the City only looked at the Austin study, which contained "summaries" of the other two studies. Interestingly, the Los Angeles study focused on bookstores and theaters only, not adult cabarets. The Indianapolis study concluded that there was no demonstrable cause-and-effect link between adult businesses and crime in the areas near those businesses.

4 Transcript of summary judgment hearing, at 114.

5 This fact is established by the Dallas zoning map introduced by Plaintiffs, with overlays showing the effect of the distance restrictions of the ordinance. That map establishes beyond argument that the ordinance eliminates almost every adult business in the City.

vast *majority* of the locations were in industrial zones. The City never argued to the contrary, but instead took the position that economic viability was totally irrelevant, under *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).[6] The court's position was that there was land available to open adult businesses in the City of Dallas, and that was the only inquiry it was entitled to make under *Renton*. The court never questioned whether the First Amendment would be violated if the result of the ordinance's enforcement was a major reduction of adult businesses.[7]

Therefore, Petitioners' statements as to the types of locations available for them neither misrepresents the record nor conflicts with the holdings below.

The third example given by Respondent of misrepresentation is Petitioners' claim that the ordinance would close every adult cabaret in the City. After a thorough re-examination of every item in the record below, it is Petitioners'

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6 As lead counsel for the City told the trial judge: "In any event, the Plaintiffs' witnesses say no, there is not adequate sites available for relocation of these businesses because they're economic problems with them, they would not be good business ventures, there are lease problems and what not. And I would submit to the Court that's all well and good but it doesn't matter. It's totally irrelevant to the inquiry in this case." Transcript of summary judgment hearing, at 11.

7 This Court has never required the actual deprivation of First Amendment rights as a prerequisite to judicial relief. Yet, the decision in this case, ignoring the consequences of the ordinance, is that no relief will be available to pre-existing businesses until after their First Amendment rights have been eliminated. Would the adult cabarets be entitled to relief if in two, or five, or ten years if only one or two had found new locations?

representation to this Court that the record establishes the following:

There were 120 adult businesses operating in the City at the time the ordinance was enacted[8] The ordinance will require the closure of approximately 110 of those businesses.[9] Every single adult cabaret plaintiff faces closure by the ordinance.[10] And the trial court was informed by plaintiffs' counsel that the ordinance would require every one of the City's twenty-nine adult cabarets to close.[11]

In any event, the trial court's ruling took no notice of the number of adult businesses closed by the ordinance; obviously, therefore, it was not concerned with the number of adult cabarets closed. It is this fact which makes this case so appropriate for review by this Court.

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8 Plaintiffs' Exhibit 3 (affadavit of Patrick M. Stewart) at 8; Plaintiffs' Exhibit 1 (map).

9 Plaintiffs' Exhibit 1; Plaintiffs' Exhibit 3, at 7-8. In the Petition for Writ of Certiorari, at 4, Petitioners represented that "about 110 [adult businesses] will have to close their doors."

10 Plaintiffs' Statement of Business Histories and Statement of Impact of Chapter 41A on Plaintiffs' Businesses, filed below pursuant to an order of the trial court.

11 It is this fact which is open to challenge. In reviewing the record in order to prepare this Brief, counsel discovered that the list of adult cabarets, by name and address, was inadvertently omitted from the map, Plaintiffs' Exhibit 1, when it was introduced. Counsel apologizes for the oversight, which occurred because the parties had less than two months from the filing of the initial Complaint until final judgment in which to prepare this very difficult and complex case.

Nevertheless, this fact can be established by the map in evidence, and judicial notice of the public records of the City of Dallas. Each adult cabaret has had to file a license application, showing its address. By locating the addresses on the map, the extent of the impact of the ordinance on the cabarets is clear.

CONCLUSION

Contrary to Respondent's assertions in its Brief, this case is not controlled by *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), a decision which approved a zoning ordinance with prospective appliation only, and did not force the closing of a single adult business. Instead, the zoning portion of the Dallas ordinance presents a major, and as yet undecided, constitutional issue to this Court, an issue which will affect hundreds of cities, thousands of adult businesses, and millions upon millions of patrons of those businesses, across the entire United States. At this point in time, there is an apparent conflict on the issue between the circuits, and the instant case is in apparent conflict with two prior decision of this Court. On these bases, it is imperative that this Court grant review of this case.

Respectfully submitted,

Richard L. Wilson
Attorney for Petitioners

APR 11 1989
JOSEPH F. SPANIOL, JR
CLERK

In The

Supreme Court of the United States

October Term, 1988

No. 87-2012
FW/PBS, INC., et al.,

Petitioners,

v.

CITY OF DALLAS, et al.,

Respondents.

No. 87-2051
M.J.R., INC., et al.,

Petitioners,

v.

CITY OF DALLAS, et al.,

Respondents.

No. 88-49
CALVIN BERRY, III, et al.,

Petitioners,

v.

CITY OF DALLAS, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals To The Fifth Circuit

JOINT APPENDIX

(All Counsel Listed on Inside Cover)

Petition for Certiorari in No. 87-2012 Filed June 8, 1988
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Petition for Certiorari in No. 87-2051 Filed June 13, 1988
Certiorari in No. 87-2051 on Issues I and II Granted February 27, 1989
Petition for Certiorari in No. 88-49 Filed June 13, 1988
Certiorari in No. 88-49 Granted February 27, 1989

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FW/PBS, INC., et al. v. CITY OF DALLAS, et al.

RELEVANT DOCKET ENTRIES

Date of Filing	*UNITED STATES DISTRICT COURT*
6/30/86	Plaintiffs', FW/PBS, Inc., et al., Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Attorneys Fees
6/30/86	Plaintiffs', FW/PBS, Inc., et al., Motion for Temporary Restraining Order and/or Preliminary Injunction
7/9/86	Court's Order requiring parties to submit affidavits and/or depositions in determining Plaintiffs', FW/PBS, Inc., et al., request for preliminary injunction
7/15/86	Plaintiffs', M.J.R., Inc., et al., Original Complaint, Complaint for Declaratory Judgment, Complaint for Temporary Restraining Order, Complaint for Temporary Injunction, Complaint for Preliminary Injunction and Complaint for Permanent Injunction
7/15/86	Plaintiffs', M.J.R., Inc., et al., Motion for Temporary Restraining Order and Brief in support thereof
7/15/86	Plaintiffs', M.J.R., Inc., et al., Application for Preliminary Injunction
7/17/86	Plaintiffs', Calvin Berry, III, et al., Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary Injunction and Permanent Injunction
7/18/86	Court's Order of Transfer, transferring Plaintiffs', FW/PBS, Inc., et al., case to

	the docket of the Honorable Jerry Buckmeyer.
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7/31/86	Defendants' Motion for Summary Judgment and Supporting Brief
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8/6/86	Court's Order confirming accelerated schedule
8/8/86	Court's Order amending Order of August 6, 1986
8/13/86	Plaintiffs', FW/PBS, Inc., et al., Cross-Motion for Summary Judgment and Supporting Brief
8/15/86	Plaintiffs', M.J.R., Inc., et al., Brief in Support of Motion for Summary Judgment
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4/20/88	United States Supreme Court Associate Justice Byron R. White's Order that judgment and mandate be temporarily stayed pending receipt of responses and further order of Court
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5/4/88	Court's Order vacating Justice Byron R. White's temporary stay, granting Petitioners' application for stay and staying judgment of the United States Court of Appeals for the Fifth Circuit in part, pending judgment of this Court
6/8/88	Petitioners' FW/PBS, Inc., et al., Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

6/13/88	Petitioners', M.J.R., Inc., et al., Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit
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2/27/89	Petitioners', FW/PBS, Inc., et al., Petition for Writ of Certiorari is granted as to Questions I, II and III of Petition; Petitioners', M.J.R., Inc., et al., Petition for Writ of Certiorari is granted as to Questions 1 and 2; and Petitioners', Calvin Berry, III, et al., Petition for Writ of Certiorari is granted.

UNITED STATES DISTRICT COURT

Case No. CA3-86-1759-R

Order of Judgment and Memorandum Opinion, *FW/PBS Inc., et al. v. City of Dallas, et al.* (Printed as Appendix F to the Petition for Certiorari in Case No. 87-2012, pp. 39-70)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 86-1723

Opinion, *FW/PBS, Inc. et al. v. City of Dallas, et al.*, (Printed as Appendix A to the Petition for Certiorari in Case No. 87-2012, pp. 1-30)

Denial of Petition for Rehearing and Suggestion for Rehearing En Banc (Printed as Appendix B to the Petition for Certiorari in Case No. 87-2012, pp. 31-32)

Denial of Petitioner's Motion for Stay of the Issuance of the Mandate pending filing of Petition for Writ of Certiorari (Printed as Appendix C to the Petition for Certiorari in Case No. 87-2012, pp. 33-36)

SUPREME COURT OF THE UNITED STATES

FW/PBS, Inc., dba Paris Adult Bookstore II, et al.,
v. City of Dallas, et al.
No. 87-2012
M.J.R., Inc., et al.,
v. City of Dallas
No. 87-2051
Calvin Berry, III, et al.,
v. City of Dallas, et al.
No. 88-49

February 27, 1989

The motion of Citizens For Decency Through Law, Inc. for leave to file a brief as amicus curiae in No. 87-2012 is granted. The petition for a writ of certiorari in No. 87-2012 is granted limited to Questions I, II and III presented by the petition. The petition for a writ of certiorari in No. 87-2051 is granted limited to Questions 1 and 2 presented by the petition. The petition for a writ of certiorari in No. 88-49 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.

CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

SEC. 41A-1. Purpose and intent.
SEC. 41A-2. Definitions.
SEC. 41A-3. Classifications.
SEC. 41A-4. License required.
SEC. 41A-5. Issuance of license.
SEC. 41A-6. Fees.
SEC. 41A-7. Inspection.
SEC. 41A-8. Expiration of license.
SEC. 41A-9. Suspension.
SEC. 41A-10. Revocation.
SEC. 41A-11. Appeal.
SEC. 41A-12. Transfer of license.
SEC. 41A-13. Location of sexually oriented businesses.
SEC. 41A-14. Exemption from location restrictions.
SEC. 41A-15. Additional regulations for escort agencies.
SEC. 41A-16. Additional regulations for nude model studios.
SEC. 41A-17. Additional regulations for adult theaters and adult motion picture theaters.
SEC. 41A-18. Additional regulations for adult motels.
SEC. 41A-19. Regulations pertaining to exhibition of sexually explicit films or videos.
SEC. 41A-20. Display of sexually explicit material to minors.
SEC. 41A-21. Enforcement.
SEC. 41A-22. Injunction.
SEC. 41A-23. Amendment of this chapter.

CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

CHAPTER 41A-1. PURPOSE AND INTENT.

(a) It is the purpose of this chapter to regulate sexually oriented businesses to promote the health,

safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

(b) It is the intent of the city council that the locational regulations of Section 41A-13 of this chapter are promulgated pursuant to Article 2372w, Revised Civil Statutes of Texas, as they apply to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the Dallas City Charter and Article 1175, Revised Civil Statutes of Texas. (Ord. 19196)

SEC. 41A-2. DEFINITIONS.

In this chapter:

(1) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing

of "specified sexual activities" or "specified anatomical areas."

(2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or

(B) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

(3) ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(A) persons who appear in a state of nudity; or

(B) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or

(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description or "specified sexual activities" or "specified anatomical areas."

(4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:

(A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(5) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(6) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

(7) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.

(8) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date of another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

(9) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.

(10) ESTABLISHMENT means and includes any of the following:

(A) the opening or commencement of any sexually oriented business as a new business;

(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(C) the addition of any sexually oriented business to any other existing sexually oriented business; or

(D) the relocation of any sexually oriented business.

(11) LICENSEE means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.

(12) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be

observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(13) NUDITY or a STATE OF NUDITY means:

(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or

(B) a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast.

(14) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(15) RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family or mobile home zoning district as defined in the Dallas Development Code.

(16) RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as defined in the Dallas Development Code.

(17) SEMI-NUDE means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

(18) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.

(19) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(20) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.

(21) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:

(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(C) masturbation, actual or simulated; or

(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.

(22) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on June 18, 1986.

(23) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

(A) the sale, lease, or sublease of the business;

(B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

(C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control. (Ord. Nos. 19196; 19377)

SEC. 41A-3. CLASSIFICATION.

Sexually oriented businesses are classified as follows:

(1) adult arcades;

(2) adult bookstores or adult video stores;

(3) adult cabarets;

(4) adult motels;

(5) adult motion picture theaters;

(6) adult theaters;

(7) escort agencies;

(8) nude model studios; and

(9) sexual encounter centers. (Ord. 19196)

SEC. 41A-4. LICENSE REQUIRED.

(a) A person commits an offense if he operates a sexually oriented business without a valid license, issued by the city for the particular type of business.

(b) An application for a license must be made on a form provided by the chief of police. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. Applicants who must comply with Section 41A-19 of this chapter shall submit a diagram meeting the requirements of Section 41A-19.

(c) The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(d) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as applicant. Each applicant must be qualified under Section 41A-5 and each applicant shall be considered a licensee if a license is granted.

(e) The fact that a person possesses a valid theater license, dance hall license, or public house of amusement license does not exempt him from the requirement of obtaining a sexually oriented business license. A person who operates a sexually oriented business and possesses a theater license, public house of amusement license or dance hall license shall comply with the requirements and provisions of this chapter as well as the requirements and provisions of Chapter 46 and Chapter 14 of this code when applicable. (Ord. 19196)

SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years

immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers.

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19 or 41A-20.

(10) An applicant or an applicant's spouse has been convicted of a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;

(dd) compelling prostitution;

(ee) obscenity;

(ff) sale, distribution, or display of harmful material to minor;

(gg) sexual performance by a child;

(hh) possession of child pornography;

(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:

(aa) public lewdness;

(bb) indecent exposure;

(cc) indecency with a child;

(iii) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

(iv) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code; or

(v) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement

imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10) may qualify for a sexually oriented business license only when the time period required by Section 41A-5(a)(10)(B) has elapsed.

(d) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time. (Ord. Nos. 19196; 19377)

SEC. 41A-6. FEES.

(a) The annual fee for a sexually oriented business license is $500.

(b) If an applicant is required by this code to also obtain a dance hall license or public house of amusement license for the business at a single location, payment of the fee for the sexually oriented business license exempts the applicant from payment of the fees for the dance hall or public house of amusement licenses. (Ord. 19196)

SEC. 41A-7. INSPECTION.

(a) An applicant or licensee shall permit representatives of the police department, health department, fire department, housing and neighborhood services department, and building inspection division to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is occupied or open for business.

(b) A person who operates a sexually oriented business or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the police department at any time it is occupied or open for business.

(c) The provisions of this section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation. (Ord. Nos. 19196; 19377)

SEC. 41A-8. EXPIRATION OF LICENSE.

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 41A-4. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.

(b) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 19196)

SEC. 41A-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of a licensee has:

(1) violated or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, or 41A-20 of this chapter;

(2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;

(3) refused to allow an inspection of the sexually oriented business premises as authorized by this chapter;

(4) knowingly permitted gambling by any person on the sexually oriented business premises;

(5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers. (Ord. 19196)

SEC. 41A-10. REVOCATION.

(a) The chief of police shall revoke a license if a cause of suspension in Section 41A-9 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee gave false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(3) a licensee or an employee has knowingly allowed prostitution on the premises;

(4) a licensee or an employee knowingly operated the sexually oriented business during a period of time when the licensee's license was suspended;

(5) a licensee has been convicted of an offense listed in Section 41A-5(a)(10)(A) for which the time period required in Section 41A-5(a)(10)(B) has not elapsed;

(6) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 41A-5(a)(10)(A), for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed;

(7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation or sexual contact to occur in or on the licensed premises. The term "sexual contact" shall have the same meaning as it is defined in Section 21.01, Texas Penal Code; or

(8) a licensee is delinquent in payment to the city for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.

(c) The fact that a conviction is being appealed shall have no effect on the revocation of the license.

(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license unless the licensee or employee knowingly allowed the act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in a public place or within public view.

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have

elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed. (Ord. Nos. 19196; 19377)

SEC. 41A-11. APPEAL.

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. If within a 10 day period the chief of police suspends, revokes, or denies issuance of a dance hall license or public house of amusement license for the same location involved in the chief's actions on the sexually oriented business license, then the chief may consolidate the requests for appeals of those actions into one appeal. (Ord. 19196)

SEC. 41A-12. TRANSFER OF LICENSE.

A licensee shall not transfer this license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application. (Ord. 19196)

SEC. 41A-13. LOCATION OF SEXUALLY ORIENTED BUSINESSES.

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

(1) a church;

(2) a public or private elementary or secondary school;

(3) a boundary of a residential district as defined in this chapter;

(4) a public park adjacent to a residential district as defined in this chapter; or

(5) the property line of a lot devoted to a residential use as defined in this chapter.

(b) A person commits an offense if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,000 feet of another sexually oriented business.

(c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(d) For the purposes of Subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion

of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.

(e) For purposes of Subsection (b) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(f) Any sexually oriented business lawfully operating on June 18, 1986, that is in violation of Subsections (a), (b), or (c) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed three years, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church, public or

private elementary or secondary school, public park, residential district, or residential lot within 1,000 feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or has been revoked. (Ord. Nos. 19196; 19377)

SEC. 41A-14. EXEMPTION FROM LOCATION RESTRICTIONS.

(a) If the chief of police denies the issuance of a license to an applicant because the location of the sexually oriented business establishment is in violation of Section 41A-13 of this chapter, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the city secretary a written request for an exemption from the locational restrictions of Section 41A-13.

(b) If the written request is filed with the city secretary within the 10-day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this code, shall consider the request. The city secretary shall set a date for the hearing within 60 days from the date the written request is received.

(c) A hearing by the board may proceed if at least two of the board members are present. The board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.

(d) The permit and license appeal board may, in its discretion, grant an exemption from the locational restrictions of Section 41A-13 if it makes the following findings:

(1) that the location of the proposed sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public safety or welfare;

(2) that the granting of the exemption will not violate the spirit and intent of this chapter of the city code;

(3) that the location of the proposed sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;

(4) that the location of an additional sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of urban renewal or restoration; and

(5) that all other applicable provisions of this chapter will be observed.

(e) The board shall grant or deny the exemption by a majority vote. Failure to reach a majority vote shall result in denial of the exemption. Disputes of fact shall be decided on the basis of a preponderance of the evidence. The decision of the permit and license appeal board is final.

(f) If the board grants the exemption, the exemption is valid for one year from the date of the board's action. Upon the expiration of an exemption, the sexually oriented business is in violation of the locational restrictions of Section 41A-13 until the applicant applies for and receives another exemption.

(g) If the board denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the board's action.

(h) The grant of an exemption does not exempt the applicant from any other provisions of this chapter other than the locational restrictions of Section 41A-13. (Ord. 19196)

SEC. 41A-15. ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.

(a) An escort agency shall not employ any person under the age of 18 years.

(b) A person commits an offense if he acts as an escort or agrees to act as an escort for any person under the age of 18 years. (Ord. 19196)

SEC. 41A-16. ADDITIONAL REGULATIONS FOR NUDE MODEL STUDIOS.

(a) A nude model studio shall not employ any person under the age of 18 years.

(b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

(c) A person commits an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio

premises which can be viewed from the public right of way.

(d) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that a sofa may be placed in a reception room open to the public. (Ord. 19196)

SEC. 41A-17. ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.

(a) The requirements and provisions of Chapter 46 of this code remain applicable to adult theaters and adult motion picture theaters.

(b) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(c) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(d) It is a defense to prosecution under Subsections (b) and (c) of this section if the person under 18 years was in a restroom not open to public view or persons of the opposite sex. (Ord. 19196)

SEC. 41A-18. ADDITIONAL REGULATIONS FOR ADULT MOTELS.

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and

vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

(b) A person commits an offense if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.

(c) For purposes of Subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration. (Ord. 19196)

SEC. 41A-19. REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and

the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed 32 square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The chief of police may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

(2) The application shall be sworn to be true and correct by the applicant.

(3) No alteration in the configuration or location of a managers's station may be made without the prior approval of the chief of police or his designee.

(4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

(5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manger's station of every area of the premises to which any patron is permitted access for any purpose

excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(6) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in Subsection (5) remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to Subsection (1) of this section.

(7) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) footcandle as measured at the floor level.

(8) It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above, is maintained at all times that any patron is present in the premises.

(b) A person having a duty under Subsections (1) through (8) of subsection (a) above commits an offense if he knowingly fails to fulfill that duty. (Ord. 19196)

SEC. 41A-20. DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.

(a) A person commits an offense if, in a business establishment open to persons under the age of 17 years, he displays a book, pamphlet, newspaper, magazine, film, or video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain or to exploit sexual lust or perversion for commercial gain, any of the following:

(1) human sexual intercourse, masturbation, or sodomy;

(2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;

(3) less than completely and opaquely covered human genitals, buttocks, or that portion of the female breast below the top of the areola; or

(4) human male genitals in a discernibly turgid state, whether covered or uncovered.

(b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:

(1) it is available to the general public for handling and inspection; or

(2) the cover or outside packaging on the item is visible to members of the general public. (Ord. 19196)

SEC. 41A-21. ENFORCEMENT.

(a) Except as provided by Subsection (b), any person violating Section 41A-13 of this chapter, upon conviction, is punishable by a fine not to exceed $2,000.

(b) If the sexually oriented business involved is a nude model studio or sexual encounter center, then violation of Section 41A-4(a) or 41A-13 of this chapter is punishable as a Class B misdemeanor.

(c) Except as provided by Subsection (b), any person violating a provision of this chapter other than Section 41A-13, upon conviction, is punishable by a fine not to exceed $500.

(d) It is a defense to prosecution under Section 41A-4(a), 41A-13, or 41A-16(d) that a person appearing in a state of nudity did so in a modeling class operated:

(1) by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;

(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or

(3) in a structure:

(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

(B) where in order to participate in a class a student must enroll at least three days in advance of the class; and

(C) where no more than one nude model is on the premises at any one time.

(e) It is a defense to prosecution under Section 41A-4(a) or Section 41A-13 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value. (Ord. Nos. 19196; 19963)

SEC. 41A-22. INJUNCTION.

A person who operates or causes to be operated a sexually oriented business without a valid license or in violation of Section 41A-13 of this chapter is subject to a suit for injunction as well as prosecution for criminal violations. (Ord. 19196)

SEC. 41A-23. AMENDMENT OF THIS CHAPTER.

Sections 41A-13 and 41A-14 of this chapter may be amended only after compliance with the procedure required to amend a zoning ordinance. Other sections of this chapter may be amended by vote of the city council. (Ord. 19196)

ARTICLE IX. PERMIT AND LICENSE APPEAL BOARD

SEC. 2-95. PERMIT AND LICENSE APPEAL BOARD – CREATED; FUNCTION; TERMS; HEARING PANELS.

(a) There is hereby created the permit and license appeal board of the city, which shall be composed of 12 members appointed by the city council.

(b) The permit and license appeal board shall hear appeals filed in accordance with Section 2-96 of this chapter.

(c) All members shall be appointed for a term to expire on September 1, 1985. Subsequent appointments shall be made in August of odd-numbered years for a two year term beginning on September 1. All members shall serve until their successors are appointed and qualified.

(d) The city secretary shall divide the board into four hearing panels for the purpose of performing the duties of the board. The city secretary shall assign cases to the hearing panels on a rotating basis. Each hearing panel has the same authority as the full board. A decision by a hearing panel constitutes a decision by the board. (Ord. 18200)

SEC. 2-96. APPEALS FROM ACTIONS OF DEPARTMENT DIRECTORS.

(a) If the director of a city department denies, suspends, or revokes a license or permit over which he has regulatory authority, and no appeal is provided by ordinance to another city board, the action is final unless the applicant, licensee, or permittee files a written appeal to

the permit and license appeal board with the city secretary within 10 calendar days after the date of receiving notice of the director's action.

(b) If a written request for an appeal hearing is filed with the city secretary within the 10 day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this chapter, shall hear the appeal. The city secretary shall set a date for the hearing within 60 days from the date of the appeal. The permit and license appeal board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.

(c) The permit and license appeal board shall decide the appeal on the basis of a preponderance of the evidence presented at the hearing if there is a dispute of fact, otherwise the board shall decide the appeal in accordance with the provisions of this code. The board shall affirm, reverse, or modify the action of the director by a majority vote. Failure to reach a majority decision on a motion shall leave the director's decision unchanged. A hearing of a permit and license appeal board may proceed if at least two of the board members are present. The decision of the permit and license appeal board is final. (Ord. 18200)

Sec. 2-97.-2-100. RESERVED

DALLAS DEVELOPMENT CODE

ARTICLE I

TITLE, PURPOSE, ENFORCEMENT, CERTIFICATE OF OCCUPANCY, FEES, NOTIFICATION SIGNS

SEC. 51-1.101. TITLE.

This chapter is known as the Dallas Development Code.

SEC. 51-1.102. PURPOSE.

The regulations in this chapter have been established in accordance with a comprehensive plan for the purpose of promoting the health, safety, morals, and general welfare of the city in order to:

(1) lessen the congestion in the streets;

(2) secure safety from fire, flooding, and other dangers;

(3) provide adequate light and air;

(4) prevent the overcrowding of land;

(5) avoid undue concentration of population;

(6) facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements;

(7) promote the character of areas of the city;

(8) limit the uses in areas of the city that are peculiarly suitable for particular uses;

(9) conserve the value of buildings; and

(10) encourage the most appropriate use of land throughout the city.

SEC. 51-1.103. ENFORCEMENT.

(a) *Criminal prosecution.*

(1) A person who violates any provision of this chapter is guilty of a separate offense for each day or portion of a day during which the violation is continued. Each offense is punishable by a fine not to exceed $1,000.

(2) A person is criminally responsible for a violation of this chapter if:

(A) the person commits the violation or assists in the commission of the violation; or

(B) the person owns part or all of the land or a structure on the land where the violation exists.

(3) A person may not use land or a structure on land located in the city for other than those uses designated as permitted uses in accordance with the provisions of this chapter.

(4) It is a defense to prosecution under this chapter that a person is in compliance with an order of the board of adjustment that specifically authorizes otherwise unlawful conduct.

(b) *Civil action.* This chapter may be enforced through civil court action as provided by state law.

(c) *Utility disconnection.* The building official may order city or private utilities to be disconnected upon failure to comply with this chapter or the building laws.

(d) *Enforcement authority.* This chapter may be enforced by the building official or any other representative of the city. (Ord. 18001)

SEC. 51-1.104. CERTIFICATE OF OCCUPANCY.

(a) *Certificate of occupancy required.*

(1) Except for the single-family and duplex uses, a person shall not use or change the use of a building, a portion of a building, or land without obtaining a certificate of occupancy from the building official.

(2) A person shall submit an application for a certificate of occupancy on a form approved by the building official either:

(A) at the time of application for a building permit if there is new construction; or

(B) before occupancy and connection of utilities if there is a change of use.

(3) The building official shall not issue a certificate of occupancy until all applicable codes and ordinances have been complied with.

(b) *Record of certificates of occupancy.*

(1) The building official shall maintain a record of all certificates of occupancy.

(2) Upon request and payment of the fee, a person may obtain copies of the certificate of occupancy issued for a building or land.

SEC. 51-1.105. FEES.

(a) *Fees for zoning amendments.*

(1) An application will not be processed until the fee has been paid.

(2) The applicant shall pay the filing fee to the director. The director shall deliver fees received to the controller on the next business day following receipt of the fees.

(3) The refund of all or part of an application fee is controlled by Section 51-4.701(f).

* * *

SEC. 51-3.102. BOARD OF ADJUSTMENT.

(a) *Creation; Membership; Appointment.* There is hereby created the board of adjustment which shall consist of five members who are residents of the city. Members are appointed by the city council for two-year terms ending on September 1 of odd-numbered years and shall serve until their successors are appointed and qualified. A vacancy for the unexpired term of any member will be filled in the same manner as the original appointment was made. The city council may appoint four alternate members to the board who serve in the absence of one or more regular members when requested to do so by the chairman or by the city manager. The alternate members serve for the same period and are subject to removal the same as regular members. The city council shall fill vacancies occuring in the alternate membership the same as in the regular membership.

(b) *Quorum and Voting.* Cases must be heard by a minimum number of five members of the board. The concurring vote of four members is necessary to decide any matter. Each member who is present and entitled to vote shall vote in accordance with Chapter 8 of this Code.

(c) *Powers and Duties.* The board has the following powers and duties which must be exercised in accordance with this chapter:

(1) to hear and decide appeals from decisions of the building official made in the enforcement of this chapter;

(2) to interpret the intent of the zoning district map when uncertainty exists because the actual physical features differ from those indicated on the zoning district map and when the rules set forth in the zoning district boundary regulations do not apply;

(3) to hear and decide special exceptions that are expressly provided for in this chapter;

(4) to bring about the discontinuance of a nonconforming use under a plan whereby the full value of the structure can be amortized within a definite time period;

(5) to hear and decide requests for change of occupancy of a nonconforming use to another nonconforming use;

(6) to hear and decide requests for the enlargement of a nonconforming use;

(7) to hear and decide requests for reconstruction of a nonconforming structure on the land occupied by the structure when the reconstruction will not permanently

prevent the return of the property to a conforming use and will not increase the nonconformity;

(8) to require the vacation and demolition of a nonconforming structure that is determined to be obsolete, dangerous, dilapidated, or substandard;

(9) to consider on its own motion or upon the request of interested property owners, the operation or alteration of any use which is a nonconforming use because of its noncompliance with the environmental performance standards set forth in this chapter, and to specify the conditions and standards which must be complied with for continuance of the nonconforming use;

(10) to grant variances from the front yard, side yard, rear yard, lot width, lot depth, coverage, floor area ratios, height, minimum sidewalks, off-street parking or off-street loading, or visibility obstruction regulations that will not be contrary to the public interest when, owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done. The variance must be necessary to permit development of a specific parcel of land which differs from other parcels of land by being of such a restrictive area, shape, or slope that it cannot be developed in a manner commensurate with the development upon other parcels of land in districts with the same zoning classification. A variance may not be granted to relieve a self created or personal hardship, nor for financial reasons only, nor may a variance be granted to permit any person a privilege in developing a parcel of land not

permitted by this chapter to other parcels of land in districts with the same zoning classification.

(d) *Meetings, Records and Rules.*

(1) All meetings and hearings of the board must be open to the public in accordance with the Texas Open Meetings Act, Article 6252-17, Vernon's Texas Civil Statutes.

(2) All records of the board are public records open to inspection at reasonable times and upon reasonable notice in accordance with the Texas Open Records Act, Article 6252-17a, Vernon's Texas Civil Statutes.

(3) The board shall adopt rules not inconsistent with this code or state law to govern its proceedings.

(e) *Effect of Decisions.*

The board's decision is final unless appealed to the district court within 10 days in accordance with Article 1011g, Vernon's Texas Civil Statutes.

* * *

SEC. 51-3.104. DEPARTMENT OF PLANNING AND DEVELOPMENT.

(a) *Creation; Membership; Appointment.* There is hereby created the department of planning and development consisting of the director of planning and development and such assistants and employees as the city council may provide for upon the recommendation of the city manager. The director shall be appointed by the city manager.

(b) *Powers and Duties.* The director shall perform the following duties and have the following powers:

(1) advise the city manager on matters affecting the urban design and physical development of the city;

(2) develop and recommend to the city manager a comprehensive plan for the city;

(3) review and make recommendations regarding proposed actions implementing the comprehensive plan;

(4) participate in the preparation and revision of the capital improvement program;

(5) administer the regulations governing the subdivision and platting of land in accordance with state and local laws;

(6) coordinate all planning relating to urban redevelopment, urban rehabilitation, and conservation intended to alleviate or prevent slums, obsolescence, blight, or other conditions of urban deterioration;

(7) give advice and provide staff assistance to the board of adjustment and the plan and zoning commission in the exercise of their responsibilities;

(8) perform all other duties required of him by the city manager or by ordinance. (Ord. Nos. 17226; 17393)

SEC. 51-3.105. BUILDING OFFICIAL.

(a) *Powers and Duties.*

(1) The building official shall issue permits in accordance with this chapter.

(2) The building official shall issue certificates of occupancy in accordance with this chapter.

(3) The building official has the authority to enforce the provisions of this chapter.

* * *

SEC. 51-7.705. DETERMINATION OF NONCOMMERCIAL MESSAGES.

(a) *Findings.* The city council finds that it may be necessary in the enforement of this article to determine whether the message displayed upon a sign is a commercial message or a noncommercial message.

(b) *Hearing.* If a person receives a notice of violations or is cited for maintaining an illegal sign, and the person notifies the city attorney in writing within 10 days of receiving the notice or citation that he believes the sign displays a noncommercial message and is, therefore, not in violation of this article, the city attorney shall postpone prosecution of the case and shall have the matter placed on the agenda of the sign control board of adjustment for appeal under Section 51-7.703(e) of this article. The board shall give the person maintaining the sign 10 days written notice of a public hearing on the matter. After hearing the evidence, the board shall decide whether the message displayed on the sign is commercial or noncommercial. No fee may be charged for this appeal.

(c) *Judicial Review.* If the board decides that the message is commercial and that the sign is illegal, the person maintaining the sign may within 10 days of the board's decision file a notice of nonacceptance of the decision with the city attorney. Within three days after receiving

notice of nonacceptance, the city attorney shall initiate suit in the district court for determination that the sign is commercial and for an injunction to prohibit display of the sign in violation of this article. The city shall bear the burden of showing that the sign is commercial. In computing the three-day time period, Saturdays, Sundays, and legal holidays are excluded.

(d) When the tenure of the sign control board of adjustment expires, hearings under Subsection (b) will be before the board of adjustment. (Ord. 18202)

CHAPTER 6A

AMUSEMENT CENTERS

Sec. 6A-1. Definitions.
Sec. 6A-2. License required.
Sec. 6A-3. Reserved.
Sec. 6A-4. License application.
Sec. 6A-5. Fee.
Sec. 6A-6. License display, replacement, and transferability.
Sec. 6A-7. Refusal to issue or renew license.
Sec. 6A-8. License revocation.
Sec. 6A-9. Appeal from refusal to issue or renew license; from decision to revoke license.
Sec. 6A-10. Hours of operation.
Sec. 6A-11. Responsibility of licensee.

SEC. 6A-1. DEFINITIONS.

In this chapter:

(1) AMUSEMENT CENTER means a business establishment in which at least 25 percent of the public floor area is devoted to coin-operated amusement devices and their public use. If a billiard hall, as defined in Chapter 9A of this code, occupies a portion of a business establishment, the billiard hall floor area shall not be included in determining the total public floor area of the establishment.

(2) COIN-OPERATED AMUSEMENT DEVICE means a machine or device operated by insertion of a coin, token or similar object, for the purpose of amusement or skill. This term does not include:

(A) musical devices;

(B) billiard tables;

(C) machines designed exclusively for children; or

(D) devices designed to train persons in athletic skills or golf, tennis, baseball, archery, or other similar sports.

(3) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.

(4) LICENSEE means a person licensed to operate an amusement center.

(5) OPERATOR means a person who manages or controls an amusement center.

(6) PERSON means an individual, assumed name entity, partnership, joint-venture, association, or other legal entity. (Ord. 14736; Ord. 14932)

SEC. 6A-2. LICENSE REQUIRED.

No person may operate an amusement center in the city without first obtaining a license from the chief of police. (Ord. 14736)

SEC. 6A-3. RESERVED.

(Repealed by Ord. 14932)

SEC. 6A-4. LICENSE APPLICATION.

(a) An applicant for a license shall file with the chief of police a written application on a form provided for that purpose, which shall be signed by the applicant, who shall be the owner of the amusement center. Should

an applicant maintain an amusement center at more than one location, a separate application must be filed for each location. The following information is required in the application:

(1) Name, address, and telephone number of the applicant, including the trade name by which applicant does business and the street address of the amusement center, and if incorporated, the name registered with the Secretary of State;

(2) Name, address, and telephone number of the operator of the amusement center and proof that the operator is at least 18 years of age;

(3) Whether the applicant, operator, and, if applicable, any corporate officer of the applicant has been convicted of a felony or within the preceding five years of an offense involving drugs, gambling, prostitution, obscenity, or unlawfully carrying a weapon;

(4) The previous occupation of the applicant, operator, and, if applicable, all corporate officers of the applicant within the preceding five years;

(5) Whether a previous license of applicant, or, if applicable, corporate officer of applicant has been revoked within two years of filing of the application;

(6) Number of coin-operated amusement devices in the center; and

(7) A statement that all the facts contained in the application are true.

(b) The chief of police may require additional information of an applicant or licensee to clarify items on the application.

(c) No applicant may maintain an amusement center in violation of the comprehensive zoning ordinance of the city. (Ord. 14736; Ord. 14932)

SEC. 6A-5. FEE.

The annual fee for an amusement center license is $7.50 for each coin-operated amusement device located in the center. Amusement center licenses expire one year from the date of issuance. The fee for issuing a replacement license for one lost, destroyed, or mutilated is $2. The fee is payable to the department of revenue and taxation upon approval of the license by the chief of police. No refund of license fees will be made. (Ord. 14736)

SEC. 6A-6. LICENSE DISPLAY, REPLACEMENT, AND TRANSFERABILITY.

(A) Each license issued pursuant to this article must be posted and kept in a conspicuous place in the amusement center and must state the number of coin-operated amusement devices for which the license was issued.

(b) A replacement license may be issued for one lost, destroyed, or mutilated, upon application on a form provided by the chief of police. A replacement license shall have the word "REPLACEMENT" stamped across its face and shall bear the same number as the one it replaces.

(c) An amusement center license is not assignable or transferable.

(d) A licensee shall notify the chief of police within 10 days of a change or partial change in the ownership or management of the amusement center, or a change of address or trade name. (Ord. 14736)

SEC. 6A-7. REFUSAL TO ISSUE OR RENEW LICENSE.

The chief of police shall refuse to approve issuance or renewal of an amusement center license for one or more of the following reasons:

(1) A false statement as to a material matter made in an application for a license;

(2) Conviction of the applicant, his operator, or corporate officer of the applicant of a felony or within the preceding five years of an offense involving drugs, gambling, prostitution, obscenity, or unlawfully carrying a weapon; or

(3) Revocation of a license, pursuant to this chapter, of the applicant or corporate officer of the applicant within two years preceding the filing of the application. (Ord. 14736; Ord. 14932)

SEC. 6A-8. LICENSE REVOCATION.

(a) The chief of police shall revoke an amusement center license for one or more of the following reasons:

(1) A false statement as to a material matter made in an application for a license, license renewal or a hearing concerning the license;

(2) Conviction of the licensee, his operator, or corporate officer of the licensee of a felony or an offense involving drugs, gambling, prostitution, obscenity, or unlawfully carrying a weapon.

(3) Conviction twice within a one year period of the licensee or his operator for a violation of the hours of operation provision of this chapter;

(4) Employment by the licensee of an operator who is under 18 years of age;

(5) Operation of an amusement center containing more coin-operated amusement devices than the center is licensed for; or

(6) Violation by the licensee or his operator of Section 6A-11 of this chapter.

(b) The chief of police shall send written notice of revocation to a licensee by certified mail, return receipt requested, setting forth the reasons for the revocation. (Ord. 14736; Ord. 14932)

SEC. 6A-9. APPEAL FROM REFUSAL TO ISSUE OR RENEW LICENSE; FROM DECISION TO REVOKE LICENSE.

If the chief of police refuses to approve the issuance of a license or the renewal of a license to an applicant, or revokes a license issued to a licensee under this article, this action is final unless the applicant or licensee, within 10 days after the receipt of written notice of the action, files with the city manager a written appeal. The city manager shall, within 10 days after the appeal is filed, consider all the evidence in support of or against the

action appealed, and render a decision either sustaining or reversing the action. If the city manager sustains the action, the applicant or licensee may, within 10 days of that decision file a written appeal with the city secretary to the city council setting forth specific grounds for the appeal. The city council shall, within 30 days, grant a hearing to consider the action. The city council has authority to sustain, reverse, or modify the action appealed. The decision of the city council is final. (Ord. 14736)

SEC. 6A-10. HOURS OF OPERATION.

(a) Except as provided in Subsection (b) or (c) of this section, no licensee or his operator may operate the amusement center between the hours of 12:01 a.m. to 9 a.m., Monday through Friday, and between the hours of 2 a.m. to 9 a.m., Saturday and Sunday.

(b) If an amusement center is within 500 feet of a district restricted to residential use under the Comprehensive General Zoning Ordinance of the City of Dallas, no licensee or his operator may operate the amusement center except between the hours of 9 a.m. to 11 p.m., Sunday through Thursday, and between the hours of 9 a.m. to 12 midnight, Friday and Saturday.

(c) If an amusement center is within 500 feet of a public or private elementary or secondary school, no licensee or his operator may operate the amusement center between the hours of 9 a.m. to 4 p.m. during the fall or spring term when students are required to attend school in the school district in which the center is located.

(d) For purposes of this chapter measurements shall be made in a straight line without regard to intervening structures or objects, from the nearest entry door in the portion of the building used as an amusement center to the nearest point of a district restricted to residential use or nearest entry door of a school.

(e) If an amusement center's hours are restricted only by Subsection (a) of this section, a licensee may obtain a temporary permit to operate continuously. The chief of police shall issue a temporary permit for no longer than 30 days and only once a year. (Ord. 14736; Ord. 14932; Ord. 16586)

SEC. 6A-11. RESPONSIBILITY OF LICENSEE.

(a) A licensee or his operator may not permit any of the following activities within the amusement center:

(1) violation of any possession, sale, or delivery provision in Subchapter 4 of the Texas Controlled Substances Act;

(2) violation of any provision in Article 666-17 (14) of the Texas Liquor Control Act;

(3) prostitution;

(4) gambling; or

(5) entry of a person younger than 17 years between the hours of 9 a.m. to 3 p.m. during the fall or spring term when students are required to attend school in the school district in which the center is located.

(b) A licensee or his operator may not permit any of the following activities on premises of the amusement center:

(1) violation of Section 42.01 of the Penal Code; or

(2) violation of Chapter 7A of the Dallas City Code.

(c) In Subsection (b) of this section, "premises" means an area, other than the interior of an amusement center, to which the public or a substantial group of the public has access and which is under the control of an owner or operator of an amusement center, such as a parking facility or private sidewalk. (Ord. 14736; Ord. 14932)

CHAPTER 14

DANCE HALLS

Sec. 14-1. Definitions.
Sec. 14-2. License required.
Sec. 14-3. Issuance of license; posting.
Sec. 14-4. Fees.
Sec. 14-5. Hours of operation.
Sec. 14-6. Inspection.
Sec. 14-7. Dance hall supervisor.
Sec. 14-8. Persons under 17 prohibited.
Sec. 14-9. Expiration of license.
Sec. 14-10. Suspension.
Sec. 14-11. Revocation.
Sec. 14-12 Appeal.
Sec. 14-13 Transfer of license.

SEC. 14-1 DEFINITIONS.

In this chapter:

(1) DANCE HALL means a place where dancing is permitted.

(2) CLASS A DANCE HALL means any place where dancing is permitted three days or more a week.

(3) CLASS B DANCE HALL means any place where dancing is permitted less than three days a week.

(4) CLASS C DANCE HALL means any place where dancing is scheduled one day at a time.

(5) CLASS D DANCE HALL means any place where instruction in dancing is given for consideration.

(6) LICENSE means a permit to operate a dance hall.

(7) LICENSEE means a person in whose name a license to operate a dance hall has been issued, as well as the individual listed as an applicant on the application for a dance hall license.

(8) PERSON means an individual, partnership, corporation, association, or other legal entity.

(9) PRIVATE CLUB means an association of persons for the promotion of some common object, which operates not for a profit a place for the accommodation of its members and guests only. (Ord. 15721)

SEC. 14-2. LICENSE REQUIRED.

(a) A person commits an offense if he operates a dance hall without a license.

(b) An application for a license must be made on a form provided by the chief of police. The applicant must be qualified according to the provisions of this chapter and his premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(c) A person who wishes to operate a dance hall must sign the application for a license as applicant. If a person who wishes to operate a dance hall is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as an applicant. A person who wishes to operate a Class D dance hall must give the name and address of each person who is an instructor. Each applicant must meet the requirements of Section 14-3(a) and

each applicant shall be considered a licensee if a license is granted.

(d) It is a defense to prosecution under this section that the actor is conducting a dance at:

(1) a private residence from which the general public is excluded;

(2) a place owned by the federal, state, or local government;

(3) a public or private elementary school, secondary school, college or university;

(4) a place owned by a religious organization; or

(5) a private club.

(e) A person who possesses a valid dance hall license shall not be required to obtain a license as a theater in accordance with the provisions of Chapter 46 of this Code if live performances are presented to the public for an admission fee, cover charge, or other consideration and the operation of the dance hall is in compliance with the provisions of this chapter. (Ord. 15721)

SEC. 14-3. ISSUANCE OF LICENSE; POSTING.

(a) The chief of police shall issue a license to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is not of good moral character, and his reputation for being peaceable and law-abiding in the community where he resides or does business is bad.

(3) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalities assessed against him or imposed upon him.

(4) An applicant uses alcoholic beverages to excess.

(5) An applicant is physically or mentally incapacitated to an extent that he cannot operate a dance hall.

(6) An applicant has failed to answer or falsely answered a question or request for information on the application form provided.

(7) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a dance hall without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(8) An applicant is residing with a person who has been denied a license by the city to operate a dance hall within the preceding 12 months, or residing with a person whose license to operate a dance hall has been revoked within the preceding 12 months.

(9) An applicant's premises have not been approved by the health department, fire department, and the building official.

(10) The license fee required by this chapter has not been paid.

(11) An applicant or an applicant's spouse has been convicted of:

(A) a felony; or

(B) a misdemeanor involving an offense of:

(i) prostitution,

(ii) promotion of prostitution,

(iii) public lewdness,

(iv) gambling,

(v) violation of the Texas Controlled Substances and Dangerous Drugs Act, or

(vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

(12) An applicant has been employed in a dance hall in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a dance hall premises in a peaceful and law abiding manner.

(b) The license shall state on its face the name of the person to whom it is granted, the expiration date, the address of the dance hall, and whether it is issued for a Class A, Class B, Class C, or Class D dance hall.

(c) The license shall be posted in a conspicuous place at or near the entrance to the dance hall so that it may be easily read at any time. (Ord. 15721; Ord. 16067)

SEC. 14-4. FEES.

The following non-refundable fees shall be charged for each license issued under the terms of this chapter:

(a) For a Class A dance hall, the annual license fee is $250.00;

(b) For a Class B dance hall, the annual license fee is $125.00;

(c) For a Class C dance hall, the daily license fee is $10.00;

(d) For a Class D dance hall, the annual license fee is $25.00. (Ord. 15721)

SEC. 14-5. HOURS OF OPERATION.

(a) A person commits an offense if he operates a Class A, Class B, or Class C dance hall between the hours of 2:00 a.m. and 7:00 a.m., Monday through Saturday, or between 2:00 a.m. and 12:00 noon on Sunday.

(b) A person commits an offense if he operates a Class D dance hall between the hours of 12 midnight and 7:00 a.m. (Ord. 15721)

SEC. 14-6. INSPECTION.

(a) Representatives of the police department, health department, fire department, and housing and urban

rehabilitation department may inspect the premises of a dance hall for the purpose of insuring compliance with the law, at any time it is open for business or occupied.

(b) A person who operates a dance hall or person designated as the dance hall supervisor commits an offense if he refuses to permit a lawful inspection of the premises of a dance hall by a representative of the police department at any time it is open for business or occupied. (Ord. 15721)

SEC. 14-7. DANCE HALL SUPERVISOR.

(a) A person who operates a dance hall must designate a person as dance hall supervisor and register his name with the chief of police.

(b) A person designated dance hall supervisor must remain on the premises of the dance hall during the time dancing is permitted and until 30 minutes after the end of the dance to insure that the dance is conducted in an orderly manner. (Ord. 15721)

SEC. 14-8. PERSONS UNDER 17 PROHIBITED.

(a) No person under the age of 17 years may enter a Class A, Class B or Class C dance hall unless accompanied by a parent or guardian.

(b) A person commits an offense if he falsely represents himself to be either a parent or guardian of a person under the age of 17 years for the purpose of gaining the person's admittance into a dance hall.

(c) A licensee or employee of a Class A, Class B, or Class C dance hall commits an offense if he knowingly allows a person under the age of 17 years to enter or remain on the premises of the dance hall unless he is accompanied by his parent or guardian. (Ord. 15721)

SEC. 14-9. EXPIRATION OF LICENSE.

(a) A license for a Class A, Class B, or Class D dance hall shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 14-2. Application for renewal should be made at least 30 days before the expiration date, and when made less than thirty days before the expiration date the expiration of the license will not be affected.

(b) A license for a Class C dance hall shall expire at 2:00 a.m. on the day following the date of the dance.

(c) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date denial becomes final. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 15721)

SEC. 14-10. SUSPENSION.

The chief of police shall suspend a dance hall license for a period of time not exceeding 30 days if he determines that a licensee or an employee of a licensee has:

(1) violated Sections 14-3(c), 14-5, 14-8, or 14-13 of this chapter;

(2) engaged in excessive use or alcoholic beverages while on the dance hall premises;

(3) refused to allow an inspection of the dance hall premises as authorized in this chapter;

(4) knowingly permitted an intoxicated person to remain on the premises;

(5) knowingly permitted gambling by any person on the dance hall premises; or

(6) demonstrated inability to operate or manage a dance hall premises in a peaceful and law abiding manner, thus necessitating action by law enforcement officers. (Ord. 15721)

SEC. 14-11. REVOCATION.

(A) The chief of police shall revoke a license if a cause of suspension in Section 14-10 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee has given false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee is unable to lawfully operate the dance hall because of physical or mental impairment;

(3) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(4) a licensee or an employee has knowingly allowed prostitution on the premises; or

(5) a licensee or an employee knowingly permitted a customer to dance during a period of time when the dance hall license was suspended.

(6) A licensee has been convicted of:

(A) a felony; or

(B) a misdemeanor involving an offense of:

(i) prostitution,

(ii) promotion of prostitution,

(iii) public lewdness,

(iv) gambling,

(v) violation of the Texas Controlled Substances and Dangerous Drugs Act, or

(vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

(c) when the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a dance hall license for one year from the date revocation became final. If, subsequent to revocation, the chief of police finds that the basis for the

revocation action has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became final. If the license was revoked under Subsection 6, and applicant may not be granted another license. (Ord. Nos. 15721; 16067)

SEC. 14-12. APPEAL.

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. (Ord. Nos. 15721; 16067; 18200)

SEC. 14-13. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a dance hall under the authority of a license at any place other than the address designated in the application. (Ord. 15721)

CHAPTER 46

THEATERS

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ARTICLE I - IN GENERAL

SEC. 46-1. DEFINITIONS.

In this chapter:

(1) A PUBLIC HOUSE OF AMUSEMENT means a structure that is used as a theater, moving picture theater, moving picture show, or orchestral concert hall.

(2) THEATER means a structure, including but not limited to a hotel, restaurant, tavern, and other comparable establishment, in which dance, drama, opera, musical, or other similar live performances are presented to the public for an admission fee, cover charge, or other consideration.

(3) MOVING PICTURE SHOW means a structure in which moving picture films are exhibited to the public for an admission fee, cover charge, or other consideration.

(4) MOVING PICTURE THEATER means a structure which is used as a theater and moving picture show.

(5) ORCHESTRAL CONCERT HALL means a structure in which vocal or instrumental musical concerts are presented to the public for an admission fee, cover charge or other consideration.

(6) LICENSE means a permit to operate a public house of amusement.

(7) LICENSEE means the person in whose name a license to operate a public house of amusement has been issued, as well as the individual(s) listed as applicant(s) on the application for a public house of amusement.

(8) PERSON means an individual, partnership, company, corporation, association, firm, organization, institution, or similar entity. (Ord. 16210)

46-2. CLASSIFICATION.

Public houses of amusement are hereby classified as follows:

(1) Theaters.

(2) Moving picture theaters.

(3) Moving picture shows.

(4) Orchestral concert halls. (Ord. 16210)

SEC. 46-3. LICENSE REQUIRED.

(a) A person commits an offense if he operates a public house of amusement without a valid license, issued by the city for the particular class of house operated.

(b) An application for a license must be made on a form provided by the chief of police. The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(c) If a person who wishes to operate a public house of amusement is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a public house of amusement is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application

for a license as applicant. Each applicant must meet the requirements of Section 46-4, and each applicant shall be considered a licensee if a license is granted.

(d) It is a defense to prosecution under this section that a theater, moving picture theater, moving picture show, or orchestral concert hall is operated by a:

(1) church, temple, synagogue, or other nonprofit religious organization;

(2) governmental entity;

(3) nonprofit civic or social organization;

(4) proprietary school which is licensed by the state;

(5) public or private elementary or secondary school;

(6) college, junior college, or university which is supported entirely or partially by taxes; or

(7) private college or university that maintains and operates educational programs from which credits are transferable to a college, junior college, or university that is supported entirely or partially by taxes.

(e) A person who possesses a valid dance hall license is not required to obtain a public house of amusement license for a theater if live performances are presented to the public for an admission fee, cover charge, or other consideration and the operation of the dance hall is otherwise in compliance with the provisions of Chapter 14 of this code.

(f) The securing of a license entitles the holder of the license to operate the classification of public house of amusement for which license was issued, and also, without additional license, to operate a public house of amusement for which a lower license fee is charged, but not a public house of amusement for which a higher fee is charged. (Ord. 16210)

SEC. 46-4. ISSUANCE OF LICENSE.

(a) The Chief of Police shall approve the issuance of a license by the Assessor and Collector of Taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age;

(2) An applicant or applicant's spouse is not of good moral character and his reputation for being peaceable and law-abiding in the community where he resides or does business is bad;

(3) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him;

(4) An applicant uses alcoholic beverages to excess;

(5) An applicant is physically or mentally incapacitated to an extent he cannot properly operate a public house of amusement;

(6) An applicant has failed to answer or has falsely answered a question or request for information on the application form provided;

(7) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a public house of amusement without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(8) An applicant is residing with a person who has been denied a license by the city to operate a public house of amusement within the preceding 12 months, or residing with a person whose license to operate a public house of amusement has been revoked within the preceding 12 months.

(9) An applicant's premises have not been approved by the health department, fire department, and the building official.

(10) The license fee required by this chapter has not been paid.

(11) An applicant or an applicant's spouse has been convicted of:

(A) a felony; or

(B) a misdemeanor involving an offense of:

(i) prostitution,

(ii) promotion of prostitution,

(iii) public lewdness,

(iv) gambling,

(v) violation of the Texas Controlled Substances and Dangerous Drugs Act, or

(vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

(12) An applicant has been employed in a public house of amusement in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a public house of amusement premises in a peaceful and law-abiding manner.

(b) The license, if granted, shall state on its face the name of the person to whom it is granted, the expiration date, and the address of the public house of amusement. The license shall be posted in a conspicuous place at or near the entrance of the public house of amusement so that it may be easily read at any time. (Ord. 16210)

SEC. 46-5. FEES.

The following non-refundable fees shall be charged for each classification of public house of amusement license issued under the terms of this chapter:

(a) For a theater, the annual license fee is $150;

(b) For a moving picture theater, the annual license fee is $75;

(c) For a moving picture show, the annual license fee is $65;

(d) For an orchestral concert hall, the annual license fee is $25. (Ord. 16210)

SEC. 46-6. HOURS OF OPERATION.

A person commits an offense if he operates a public house of amusement between the hours and 2:00 a.m. and 7:00 a.m.; Monday through Saturday, or between the hours of 2:00 a.m. and 12 noon Sunday. (Ord. 16210)

SEC. 46-7. INSPECTION.

(a) Representatives of the police department, health department, fire department, tax department, and housing and urban rehabilitation department may inspect the premises of a public house of amusement for the purpose of insuring compliance with the law, at any time it is open for business or occupied.

(b) A person who operates a public house of amusement or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises of a public house of amusement by a representative of the police department at any time it is open for business or occupied. (Ord. 16210)

SEC. 46-8. EXPIRATION OF LICENSE.

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 46-3. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.

(b) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 16210)

SEC. 46-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of a licensee has:

(1) violated Section 46-6, Section 46-7, Section 46-12.1, Section 46-12.2, or Section 46-12.3 of this chapter;

(2) engaged in excessive use of alcoholic beverages while on the public house of amusement premises;

(3) refused to allow an inspection of the public house of amusement premises as authorized by this chapter;

(4) knowingly permitted gambling by any person on the public house of amusement premises;

(5) demonstrated inability to operate or manage a public house of amusement premises in a peaceful and law-abiding manner thus necessitating action by law enforcement officers. (Ord. 16210)

SEC. 46-10. REVOCATION.

(a) The chief of police shall revoke a license if a cause of suspension in Section 46-9 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee has given false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee is unable to lawfully operate the public house of amusement because of physical or mental impairment;

(3) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(4) a licensee or an employee has knowingly allowed prostitution on the premises; or

(5) a licensee or employee knowingly operates a public house of amusement during a period of time when the licensee's license was suspended; or

(6) a licensee has been convicted of:

(A) a felony; or

(B) a misdemeanor involving an offense of:

(i) prostitution,

(ii) promotion of prostitution,

(iii) public lewdness;

(iv) gambling,

(v) violation of the Texas Controlled Substances and Dangerous Drugs act, or

(vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

(c) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a public house of amusement license for one year from the date revocation became final. If, subsequent to revocation, the chief of police finds that the basis for the revocation actions has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became final. If the license was revoked under Subsection 6, an applicant may not be granted another license. (Ord. 16210)

SECTION 46-11. APPEAL.

(a) If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to the city manager within 10 days after receipt of the notice from the chief of police. The action of the chief of police is final unless a timely appeal is made. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the city manager, or his designee, makes a final decision.

(b) The city manager, or his designated representative, shall serve as hearing officer and consider evidence

offered by any interested person. The formal rules of evidence do not apply to an appeal hearing under this section; the hearing officer shall make his decision on the basis of a preponderance of the evidence presented at the hearing. The hearing officer must render a final decision within 30 days after the request for a hearing is filed. The hearing officer shall affirm, reverse, or modify the action of the chief of police. The decision of the hearing officer is final unless the applicant or licensee files a written request with the city secretary for a hearing before the license appeal board within 10 days after receipt of notice of the action of the hearing officer.

(c) If a written request for an appeal hearing is filed with the city secretary within the 10 day limit, the city council shall appoint three city council members to serve as a license appeal board and shall set a date for the hearing. The license appeal board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply. The license appeal board shall decide the appeal on the basis of a preponderance of the evidence presented at the hearing if there is a dispute as to fact, otherwise the board shall decide the appeal in accordance with the express provisions of this chapter. The board shall affirm, reverse, or modify the action of the hearing officer by a majority vote. Failure to reach a majority decision on a motion shall leave the hearing officer's decision unchanged. The decision of the license appeal board is final. (Ord. 16210)

SEC. 46-12. RESERVED.

(Repealed by Ord. 16210)

SEC. 46-12.1. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a public house of amusement under the authority of a license at any place other than the address designated in the application. (Ord. 16210)

SEC. 46-12.2. SPIELING PROHIBITED.

A person commits an offense if he stands in front of, or is on any public street in front of, any public house of amusement, and by spieling or loud talking, seeks to induce passersby to enter or patronize the public house of amusement. (Ord. 16210)

SEC. 46-12.3 PROHIBITING EXHIBITION OF CERTAIN SEXUALLY EXPLICIT FILMS IN SPECIFIED AREAS.

(a) A person commits an offense if he operates or causes to be operated within 1000 feet of a church, public or private elementary or secondary school, district restricted to residential use by the Comprehensive Zoning Ordinance of the city, or public park adjacent to a district restricted to residential use a moving picture show or moving picture theater which exhibits a film that explicitly depicts:

(1) contact between any part of the genitals of one person and the genitals, mouth, or anus of another person;

(2) contact between a person's mouth, anus, or genitals and the mouth, anus, or genitals of an animal or fowl;

(3) manipulation of a person's genitals;

(4) defecation; or

(5) urination.

(b) It is a defense to prosecution under Subsection (a) that the moving picture theater or moving picture show was being operated lawfully as a moving picture theater or moving picture show at the same location and upon the same premises upon the effective date of this subsection and has continuously operated at that location as a moving picture theater or moving picture show. (Ord. Nos. 16210, 16270)

SEC. 46-12.4. MEASUREMENT OF DISTANCES.

For the purposes of this article, measurement shall be made in straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a theater or show is conducted to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of a district restricted to residential use. (Ord. 16210)

ARTICLE II.
MOTION PICTURE CLASSIFICATION

SEC. 46-13. DEFINITIONS.

(a) In this article:

(1) ADVERTISEMENT means material which is designed to attract the attention of the public to a film and is displayed by use of a newspaper.

(2) BOARD means the Dallas Motion Picture Classification Board.

(3) FILE means to deliver to the director of consumer services.

(4) FILM means a motion picture, but does not include a motion picture which depicts current events or news.

(5) INITIAL EXHIBITION means the first public showing of a film in the city.

(6) INTERESTED PARTY means a film distributor or exhibitor who has a monetary interest in a film.

(7) NOT SUITABLE FOR YOUNG PERSONS means a film:

(A) which depicts sexual conduct, nudity, defecation, or urination in a manner which is patently offensive to the average person applying contemporary community standards with respect to what is suitable for viewing by young persons; and which, taken as a whole:

(i) appeals to the prurient interest of young persons; and

(ii) lacks serious literary, artistic, political, or scientific value for young persons; or

(B) which explicitly depicts the infliction of serious bodily injury by a person upon another person or animal, or which explicitly depicts a person inflicting

serious damage to or destroying property, and the infliction of injury, damage, or destruction is:

(i) an intentional act;

(ii) depicted without the express portrayal of significant adverse legal, physical, emotional, or societal consequences to the person who inflicts the injury, damage, or destruction; and

(iii) contrary to contemporary community legal, ethical, or moral standards; or

(C) which explicitly depicts serious bodily injury to a person, and the depiction of the injury is patently offensive to the average person applying contemporary community standards with respect to what is suitable for viewing by young persons.

(8) NUDITY means a human bare buttock, anus, male genitals, female genitals, or female breast.

(9) OBSCENE LANGUAGE means spoken words which are lewd, lascivious, or filthy.

(10) PROPERTY means:

(A) real property; or

(B) tangible personal property, including anything severed from land.

(11) PRURIENT INTEREST means a shameful or morbid interest in sexual conduct, nudity, defecation, or urination.

(12) RECKLESS means a person's mental state with respect to circumstances surrounding his conduct or

the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint.

(13) SERIOUS BODILY INJURY means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of any bodily member or organ.

(14) SERIOUS DAMAGE means damage to property which results in a substantial pecuniary loss to the owner or a third person.

(15) SEXUAL CONDUCT means:

(A) any contact between any part of the genitals of one person and the genitals, mouth, or anus of another person;

(B) any contact between a person's mouth, anus, or genitals and the mouth, anus, or genitals of animal or fowl; or

(C) any manipulation of a person's genitals.

(16) YOUNG PERSON means a person who is under the age of 16 years.

(b) In computing a period of time prescribed or allowed under this article, the day of an act or event is not included in the computation of the time period. The

last day of the period of time is included in the computation unless that day is a Saturday, Sunday or legal holiday, in which event the next day following which is not a Saturday, Sunday, or legal holiday is included in the computation. (Ord. Nos. 12169; 14862; 14930; 15365; 16133; 17517)

SEC. 46-14. MOTION PICTURE CLASSIFICATION BOARD ESTABLISHED.

(a) There is created a board to be known as the motion picture classification board composed of a chairman, vice-chairman and 24 other members to be appointed by the city council. Members shall serve without pay and their terms of office will be for a period of two years beginning on September 1 of each odd numbered year. The board shall adopt rules and regulations, subject to approval of the city council, to govern its proceedings and deliberations. When a vacancy occurs on the board, the city council shall appoint a new member to fill the vacancy for the unexpired term. Six members shall constitute a quorum and issues shall be decided by a simple majority of those present.

(b) Members of the board must be residents of the city, and shall be chosen as far as practicable in a manner that will represent the entire community. Members should be educated or experienced in one or more of the following fields: art, drama, law, literature, philosophy, sociology, psychology, history, education, music, science, or other fields. At least four members must be qualified to interpret and write the Spanish language, (Ord. Nos. 12169; 12373; 14552; 14730; 14862; 14930; 14952)

SEC. 46-15. CLASSIFICATION PROCEDURE.

(a) Within a reasonable time before initial exhibition, a distributor shall file an application which contains the following information concerning a film:

(1) Proposed classification, either "Suitable for Young Persons" or "Not Suitable for Young Persons".

(2) Title of film and date of initial exhibition.

(3) Summary of plot and names of the primary actors.

(b) If a "Not Suitable for Young Persons" classification is proposed by a distributor, the board shall accept the classification by formal board action or failure to act within seven days after the application is filed. If a "Suitable for Young Persons" classification is proposed by a distributor, the board shall:

(1) accept the classification by:

(A) formal board action; or

(B) failure to act within seven days after an application is filed unless the board directs additional information filed;

(2) direct a distributor to file additional information on a film and when the information is filed, accept the classification by:

(A) formal board action; or

(B) failure to act within seven days after the additional information is filed unless the board orders projection of a film;

(3) order a distributor to project a film before the board and accept the classification by:

(A) formal board action; or

(B) failure to act within two days after viewing a film or failure to meet after a screening is scheduled; or

(4) reject the classification and determine a classification by formal board action within two days after viewing a film.

(c) A distributor shall provide a suitably equipped screening room for the board to view a film at reasonable hours and may present additional information in support of a proposed classification.

(d) If the board files a "Not Suitable for Young Persons" classification order and the proposed classification had been "Suitable for Young Persons", the order shall contain the following information:

(1) Classification.

(2) Basis for classification under this article.

(3) Any other information the board considers useful to a distributor.

(e) If the board files a "Suitable for Young Persons" classification order, the board may attach one or more of the following symbols to indicate exceptions to the order and to advise parents of young persons that a film contains certain material:

(1) 'L' means obscene language or language used to describe sexual conduct, defecation, urination, or genitalia.

(2) "S" means sexual conduct or implicit sexual conduct or defecation or urination.

(3) "V" means infliction of serious bodily injury to a person or animal, or infliction of serious damage to or destruction of property.

(4) "D" means use of harmful drugs or drug abuse.

(5) "N" means nudity.

(6) "P" means a perverse person such as a masochist, sadist, pederast, or other aberrant sexual person.

The attachment of an exception to an order is for public information only and is not subject to judicial review under Section 46-16 of this article.

(f) If the board files a classification order without viewing a film and subsequent investigation reveals a possible erroneous classification, the board may order projection of the film under this section. In the event a film is reclassified, the interested party shall alter his advertising accordingly within two days after the reclassification and comply immediately with the audience provisions of this article. After one year from an original classification order unless the time limit is waived by the board, a distributor may file an application for reclassification in which case the procedures in this section apply.

(g) When the board files a classification order or any other order under this article, the director of consumer affairs shall give notice of the order by mail to the distributor and any other interested party who requests the notice.

(h) No young person may attend a screening of a film while the board is viewing the film for the purpose of classification under this article. (Ord. Nos. 12169; 13271; 13525; 13548; 14730; 14862; 14930; 15365; 15511; 16295; 17517)

SEC. 46-16. JUDICIAL REVIEW.

(a) Within two days after the board files a classification order under Section 46-15(d) of this article, an interested party may file notice of nonacceptance of the classification. Within three days after notice of nonacceptance is filed, the board shall initiate suit in district court for determination that a film is "Not Suitable for Young Persons" and for an injunction to prohibit the exhibition of the film in violation of this article. The board shall bear the burden of showing that the film is "Not Suitable for Young Persons" and shall proceed with all diligence and expedition in the adjudication of the case.

(b) When a notice of nonacceptance is filed by an interested party, this action constitutes nonacceptance by both the distributor and exhibitor. (Ord. Nos. 12169; 14930; 15365)

SEC. 46-17. CERTAIN ACTS DECLARED PUBLIC NUISANCES.

The following acts are declared to be public nuisances under this article:

(1) A violation of Section 46-18(a) of this article.

(2) Violation of Section 46-18(c)(1) or (2) of this article by an exhibitor, if he or his employee is convicted three times within a two-year period.

(3) Exhibition of a film classified "Not Suitable for Young Persons" at which more than three young persons are in attendance. (Ord. Nos. 12169; 14930)

SEC. 46-18. UNLAWFUL ACTS.

(a) An exhibitor or employee of an exhibitor commits an offense, without regard to his mental state, if he:

(1) exhibits a film which has not been classified by the board:

(2) exhibits a film contrary to a classification order;

(3) fails to post conspicuously in a ticket booth of a theater the classification order; or

(4) exhibits in a theater to a young person a filmed advertisement of a film which has not been classified or is classified "Not Suitable for Young Persons."

(b) A young person commits an offense, without regard to his mental state, if he:

(1) represents falsely he is 16 years of age or older for the purpose of viewing a film classified "Not Suitable for Young Persons"

(2) represents falsely that a person is his parent or legal guardian for the purpose of viewing a film classified "Not Suitable for Young Persons", or

(3) views a film classified "Not Suitable for Young Persons" if a sign is posted conspicuously in a ticket booth of a theater indicating a "Not Suitable for Young Persons" classification.

(c) A person commits an offense if he recklessly:

(1) sells or gives to a young person a ticket to a film classified "Not Suitable for Young Persons";

(2) allows a young person to view a film classified "Not Suitable for Young Persons";

(3) makes a false statement for the purpose of enabling a young person to view a film classified "Not Suitable for Young Persons"; or

(4) allows a young person to attend a screening of a film while the board is viewing the film for the purpose of classification under this article.

(d) A film distributor or employee of a distributor commits an offense, without regard to his mental state, if he fails to have a film classified by the board and the film is exhibited to the public.

(e) Upon failure of a distributor to obtain a classification order for a film, an exhibitor of the film may notify in writing the director of consumer affairs of his intent to exhibit and advertize the film as "Not Suitable for Young Persons" until a classification order is obtained. After notification, the exhibitor shall treat the film as if it were "Not Suitable for Young Persons" and comply with the provisions of this article in that regard.

(f) A film distributor or employee of a distributor commits an offense, without regard to his or her mental

state, if he or she prohibits any person who is sixteen years of age or over from attending the screening of a film at the time the board is viewing the film. It is a defense to prosecution under this subsection (f) if a film distributor or an employee of a distributor prohibits a person from attending a screening in order to comply with Chapter 16 of this code. (Ord. Nos. 12169; 14930; 15145; 15365; 16133; 17028)

SEC. 46-19. DEFENSE.

(a) It is a defense to prosecution under Sections 46-17(3), 46-18(a)(4), 46-18(b)(3), 46-18(c)(1) or 46-18(c)(2) of this article that the young person was accompanied by his parent or legal guardian during exhibition of the film.

(b) If is a defense to prosecution under Section 46-18(a)(2), 46-18(a)(3), 46-18(a)(4), 46-18(b)(3), 46-18(c)(1), 46-18(c)(2), and 46-20(a)(2)(A) of this article that a notice of nonacceptance has been filed and no temporary or permanent injunction has been granted pursuant to the provisions of Section 46-16. (Ord. Nos. 12169; 13525; 13548; 14930; 16133; 17517)

SEC. 46-20. ADVERTISEMENT.

(a) A film distributor, exhibitor, or an employee of a film distributor or exhibitor commits an offense, without regard to his mental state, if he:

(1) places or causes to be placed an advertisement for a film which has not been classified by the board;

(2) places or causes to be placed an advertisement which:

(A) fails to display or displays incorrectly the classification order of the board; or

(B) describes as "Suitable" a film classified by the board as "Not Suitable for Young Persons", regardless of whether a notice of nonacceptance has been filed and regardless of whether a temporary or permanent injunction has been granted pursuant to the provisions of Section 46.16; or

(3) places or causes to be placed an advertisement which fails to comply with the following requirements:

(A) Minimum type size of six points for a classification order if the advertisement is at least two columns in width and two inches in height.

(B) Minimum type size of five points for a classification order if the advertisement is less than two columns in width and two inches in height and Section 46-20(a)(3)(C) does not apply.

(C) A point size and style for a classification order which is the same as the show time if the advertisement is three-fourths an inch or less in height.

(D) Type style and face for a classification order which is legible and readable.

(E) Location for a classification order which is near the Motion Picture Association of America rating, if a rating appears.

(b) In an advertisement, the wording of a classification order is:

(1) "Not Suitable", if the order is "Not Suitable for Young Persons";

(2) "Suitable Except (S)(V)(L)(D)(N)(P)", whichever symbol applies if the order is "Suitable for Young Persons" with Exceptions; or

(3) "Suitable", if the order is "Suitable for Young Persons".

(c) It is a defense to prosecution under Subsection (a) of this section that the advertisement appeared only before the day of initial exhibition.

(d) It is a defense to prosecution under Subsection (a)(2) of this section that the actor was unable to correct the advertisement immediately, but the correction was made within a reasonable time after the classification order was issued.

(e) If a theater primarily exhibits Spanish language films or a newspaper primarily publishes in the Spanish language, the display or advertisement of a classification order which is required under this chapter must appear in the Spanish language. (Ord. Nos. 15145; 15365; 17517)

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No. 87-2051

In The

Supreme Court of the United States

October Term, 1988

M.J.R., INC., et al.,

Petitioners,

vs.

CITY OF DALLAS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PETITIONERS M.J.R., INC., et al.

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QUESTIONS PRESENTED

I. Is The License Requirement of Dallas City Code § 41A-4(a) Facially Unconstitutional As An Impermissible Prior Restraint Because It Lacks Adequate Procedural Safeguards Against Censorship By Delay As Required by *Freedman v. Maryland*, 380 U.S. 51 (1965), And Numerous Subsequent Decisions Of This Court?

II. In Providing For License Denial And Revocation On The Basis Of Prior Speech Offenses, Does The Dallas Ordinance Impose A Classic Prior Restraint Of The Type Prohibited As Facially Unconstitutional Under The Rule Of *Near v. Minnesota*, 283 U.S. 697 (1931)?

III. In Providing For License Denial And Revocation On The Basis Of Various Non-Speech Violations, Does The Dallas Ordinance Impose A Prior Restraint Which Cannot Withstand Strict Scrutiny?

LIST OF PARTIES

PETITIONERS

There were three groups of Appellants in the consolidated case in the Court of Appeals. Petitioners herein are listed in Group I, and all other Appellants in Group II.

I.

M.J.R., Inc.; Tempo Tamers, Inc.; S.B. LaBare, Inc.; Allen & Burch, Inc.; Southern Belles Partnership, Inc.; D. Burch, Inc.; Deja Vu, Inc.; Corporation Lex, Inc.; and S.B. Youngbloods, Inc.

II.

FW/PBS, Inc.; DSB, Inc.; Lone Star Multi Theatres, Inc.; Bi-Ti Enterprises, Inc.; Gattie Corporation; J.R.E. Enterprises; Entertainment Unlimited; Charles E. Carlock; Beverly K. VanDusen; Bill Slaten, Jr.; Calvin Berry, III; Saujay Patel; Rudolph Fernandez; and Dallas Motel Association.

RESPONDENTS

The following parties were Appellees in the Court of Appeals; The City of Dallas, Texas; A. Starke Taylor, Mayor; and Billy Prince, Chief of Police.

There are no entities to report or list pursuant to this Court's Rule 28.1.

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PETITIONERS M.J.R., INC., et al.

OPINIONS BELOW

Petitioners adopt the discussion of the Opinions Below set forth in the opening brief of petitioners FW/PBS, et al., in No. 87-2012, previously filed with this Court.

JURISDICTION

Petitioners adopt the discussion of Jurisdiction presented in the opening brief of petitioners FW/PBS, et al.,

except to point out that petitioners herein filed their petition for certiorari on June 13, 1988, and review was granted on the first two Questions Presented in this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners adopt the Constitutional and Statutory Provisions presented in the opening brief of petitioners FW/PBS, et al., as supplemented by the following additional provisions of the Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas (hereinafter "Dallas City Code" or "D.C.C."):

1. D.C.C. §§ 2-95 and 2-96 (defining powers and procedures of Dallas' Permit and License Appeal Board) are set forth at Joint Appendix (J.A.) 38-39.

STATEMENT OF THE CASE

Petitioners adopt the Statement Of The Case set forth in the opening brief of petitioners FW/PBS, et al., except as modified or supplemented below.

Petitioners herein all operate businesses defined by § 41A-2(3) of the Dallas City Code as "adult cabarets." The dancing featured at petitioners' adult cabarets consists of non-obscene performances which, though sexually oriented, constitute presumptively protected "speech" within the meaning of the First and Fourteenth

Amendments to the United States Constitution. Only consenting adults are allowed admission to petitioners' businesses.

On July 15, 1986 a complaint for declaratory and injunctive relief against enforcement of Chapter 41A was filed by some of these petitioners in the Northern District of Texas. On July 25, 1986 an amended complaint was filed on behalf of all these petitioners.

On August 4, 1986, the petitioners' complaint was consolidated under a single case number with similar complaints filed by the petitioners in *FW/PBS, Inc., et al. v. City of Dallas, et al.* (No. 87-2012) and *Calvin Berry, et al. v. City of Dallas, et al.* (No. 88-49). Thereafter, the three cases proceeded under a single case number in both of the courts below. In order to minimize their respective legal costs, counsel for petitioners in No. 87-2012 (*FW/PBS, Inc. v. Dallas*) agreed to do the primary briefing of the licensing issues in this case at both of the lower court levels. In turn, counsel for M.J.R., et al., agreed to do the primary legal work with respect to the zoning issues raised by the consolidated complaints.

Petitioners further supplement the statement of the case presented in No. 87-2012 by pointing out that the opening brief of appellant FW/PBS, Inc. filed in the Court of Appeals challenged the licensing requirement of Chapter 41A on a wide variety of grounds, including the claim that it constituted a prior restraint, *inter alia*, because it allowed "unconstitutionally broad discretion to licensing officials" and also because the inspection requirements of § 41A-7 are unconstitutional. Violation of those inspection requirements constitutes a ground for both the denial and

suspension of a sexually oriented business license (see §§ 41A-5(a)(9) and 41A-9(1), respectively) and, if committed twice within a year, constitutes ground for revocation of such a license (see § 41A-10(a)).

In upholding the ordinance, the panel's majority considered and rejected both of the grounds of challenge noted above, as well as numerous others.

SUMMARY OF ARGUMENT

Chapter 41A of the Dallas City Code, requiring a special license for all "sexually oriented businesses," is one of the most onerous licensing laws ever imposed on businesses engaged in First Amendment activity. In essence, this ordinance's complex and burdensome regulations allow for the censorship of an entire area of officially disapproved, though constitutionally protected, speech.

Although this law requires a license as a prerequisite to exercising fundamental rights of freedom of speech and press, the Court of Appeals analyzed its constitutionality under an unprecedented deferential standard of review rather than utilizing the settled principle that "[a]ny system of prior restraint . . . 'comes to this Court bearing a heavy presumption against its constitutional validity.' " *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 316, n.13 (1980) and cases there cited. The Court of Appeals fundamentally erred by confusing laws which merely *burden* speech (e.g., laws imposing taxes or restrictive zoning requirements) with laws which absolutely *bar* speech, i.e., prior restraints.

Because the denial of a license constitutes an absolute prior restraint on all further expression, this Court has

always reserved its most exacting scrutiny for any law requiring a license to engage in expression, sexually oriented or otherwise. See, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. ___, 108 S.Ct. 2138 (1988)).

A constant principle which illuminates this Court's First Amendment decisions is that regulations of protected expression must use "sensitive tools"[1] in order to remove from the public domain only that speech which is proven to be without constitutional protection. However, rather than using precise tools and focusing on particular items of expression, Dallas has followed the convenient but constitionally intolerable path of attempting to restrain all future speech by a blunderbuss approach which establishes a wide variety of overbroad or discretionary grounds justifying the denial of a license – a most virulent and effective tool for prior restraint.

The first and overarching defect affecting this entire ordinance is that it imposes the prior restraint of a license requirement without any of the procedural safeguards which this Court has found necessary to insure that judicial review will not be "too little or too late." *See, e.g., Freedman v. Maryland, supra*, 380 U.S. at 57. Although the statutory scheme is so complex that it provides the Chief of Police with a virtually endless list of available reasons for potentially denying a license, it fails to guarantee that one who has been denied a license, or whose license

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[1] *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

application has not been promptly acted upon, can obtain prompt judicial review within a specified brief period after an application is filed. The ordinance also lacks the essential procedural safeguard most recently confirmed by this Court in *Riley v. National Federation of the Blind of North Carolina*, ___ U.S. ___, 108 S.Ct. 2667 (1988), that an administrative official denying a license to engage in expression must have the burdens of initiating judicial review and justifying the denial. The need for these important procedural safeguards is heightened where, as here: (1) a special license is required for those engaged in a type of protected expression toward which government is frequently hostile; and (2) the ordinance provides a nearly endless list of potential bases for the denial of such a license.

However, even aside from its *Freedman* deficiencies, this licensing scheme is riddled with unconstitutional provisions which require its facial invalidation. First, city officials may deny or revoke a license upon proof that the licensee, the applicant, or one who *resides* with the applicant has committed a single obscenity violation. In upholding this provision, the Court of Appeals violated not only the clear prohibition of this Court's holding in *Near v. Minnesota, supra*, but also the unanimous holding of its own *en banc* court in *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (5th Cir. *en banc* 1978), *aff'd. on other grounds*, 445 U.S. 308 (1980) (holding that a Texas nuisance statute would be unconstitutional if construed to allow the padlocking of theaters which had exhibited any films adjudicated to be obscene), as well as the parallel holdings of dozens of other state and lower federal courts.

Other provisions of the challenged legislation permit the denial or revocation of a license where the licensee, the applicant or one who merely *resides* with the applicant, has been convicted of certain specified non-speech offenses. In sustaining these disqualification criteria, the Court of Appeals required the City to demonstrate no more than a rational basis. Yet, strict scrutiny is mandated by this Court's prior decisions because licensure under the ordinance is a prerequisite to engaging in *any* speech, rather than a mere burden on the exercise of speech. The City has not demonstrated and cannot demonstrate that its disqualification criteria meet that demanding standard of review. As the Court of Appeals stated in *Fernandes v. Limmer*, 663 F.2d 619, 630 (5th Cir. 1981): "Persons with prior criminal records are not First Amendment outcasts." "Punishment for criminal behavior must be government's response to an abuse of the privilege [of freedom of speech]; prospective restraints are unconstitutional." *Id.* at 628.

The ordinance also establishes criteria for denial, nonrenewal or revocation of a license which confer impermissibly broad *discretion* on the Chief of Police, in violation of an unbroken string of cases in this Court holding that discretionary laws licensing speech are unconstitutional *per se*. *See e.g., Lakewood v. Plain Dealer, supra*, and cases there cited. These provisions include, *inter alia*: (1) allowing the Chief to suspend or deny a license if, in the Chief's sole opinion, the applicant has "demonstrated that he is unable to operate . . . a sexually oriented business in a peaceful and law-abiding manner . . . ."; (2) the chief has discretion to suspend a license if he is of the opinion that the licensee or an employee has

"engaged in excessive use" of alcohol while on the premises; (3) the Chief of Police also has discretion to deny a license if, in his opinion, the applicant has "failed to provide information 'reasonably necessary' for issuance of the license"; and (4) under other sections, the Chief has unfettered discretion to turn down a request for renewal of a license or for reinstatement of a revoked license after all the bases for any prior denial or revocation have been corrected.

Other provisions of the ordinance provide that a license can be denied if the licensee has not submitted to warrantless searches of its premises by any of five different administrative agencies including the health department, the fire department, the housing and neighborhood services department, the building inspection department and the police department.

The ordinance also authorizes the denial of a license if any of a variety of administrative agencies have found any minor building, health or fire code violations but then precludes reapplication for a license long after the basis for the original problem has been eliminated.

In sum, the ordinance establishes a licensing requirement with disqualification criteria so limitless, and with so many discretionary and overbroad provisions, that a hostile administrative official could impose an absolute prior restraint against any applicant incurring his or her displeasure, and all under a scheme which fails to guarantee that judicial review will be anything other than "too little or too late."

Petitioners respectfully submit that the licensing scheme is so rife with constitutional difficulties that it

neither can nor should be salvaged by any feat of judicial construction. In short, the collective overbreadth is so substantial that a declaration of facial invalidity of the licensing requirement of § 41A-4(a) is warranted. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, n. 12 (1985).

For all these reasons, this Court should strike Dallas' sexually oriented business licensing law on its face.

ARGUMENT

I

THE LICENSE REQUIREMENT OF DALLAS CITY CODE § 41A-4(a) IS UNCONSTITUTIONAL ON ITS FACE AS AN IMPERMISSIBLE PRIOR RESTRAINT BECAUSE IT LACKS ADEQUATE PROCEDURAL SAFEGUARDS AGAINST CENSORSHIP BY DELAY AS REQUIRED BY *FREEDMAN v. MARYLAND*, 380 U.S. 51 (1965) AND NUMEROUS SUBSEQUENT DECISIONS OF THIS COURT.

A. The Court Of Appeals Erred In Applying The Deferential Standard Of Review Applicable To Time, Place And Manner Restrictions Rather Than The Strict Scrutiny Required Of All First Amendment Licensing Laws By *Freedman v. Maryland*.

Petitioners below stressed that the entire sexually oriented business licensing scheme was facially unconstitutional because it lacked the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965). However, the panel majority rejected this argument, asserting that this

licensing law should be analyzed under the deferential standard of review applicable to time, place and manner restrictions rather than the strict scrutiny which this Court has always applied to any law requiring a license to engage in speech activity. The following history of the *Freedman* line of cases will demonstrate the clear error of the panel majority's holding.

In *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938), this Court recognized that "[t]he struggle for the freedom of the press was *primarily directed* against the power of the licensor." (Emphasis added.)

> "[T]he liberty of the press became initially a right to publish *'without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a *leading purpose* in the adoption of the constitutional provision." 303 U.S. at 451-452 (some emphases added, some in original).

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969), this Court referred to "the prior restraint of a license," recognizing that *all* laws subjecting the exercise of First Amendment freedoms to a prior license requirement act as prior restraints. Although the mere fact that licensing requirements constitute prior restraints does not make them *per se* unconstitutional,[2] nonetheless, in a long line of decisions implementing the Framer's basic hostility to laws licensing speech, this Court has

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[2] *See, e.g., Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).

repeatedly stricken the overwhelming majority of such laws, applying a heightened or "strict" standard of scrutiny.[3]

This Court's exacting scrutiny of laws licensing speech is consistent with another line of its cases holding that "any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 70; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization For a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181

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[3] *See, e.g., Hague v. C.I.O.*, 307 U.S. 496 (1939) (permit needed to lease a hall for a public meeting involving advocacy of obstruction of the government); *Schneider v. State*, 308 U.S. 147 (1939) (permit needed to distribute handbills on public streets or sidewalks); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (permit needed for charitable or religious solicitations); *Largent v. Texas*, 318 U.S. 418 (1943) (permit needed for sale of books or tracts); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (license tax for selling door to door stricken as applied to Jehovah's Witnesses engaging in First Amendment activity); *Saia v. New York*, 334 U.S. 558 (1948) (permit needed to use sound amplification devices); *Kunz v. New York*, 340 U.S. 290 (1951) (permit needed to hold public worship meetings on streets); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (permit required for exhibition of motion picture films); *Gelling v. Texas*, 343 U.S. 960 (1952) (permit required for exhibiting motion picture films); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (permit needed to solicit members for an organization); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (films could only be exhibited to minors if first permitted by a board of censors); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (parade permit); and *City of Lakewood v. Plain Dealer Publishing Co.*, ___ U.S. ___, 108 S.Ct. 2138 (1988) (annual permit needed to operate any news racks on public sidewalks).

(1968); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931)." *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 316, n.13 (1980).

Applying the principles above, two lines of cases have developed in this Court's review of licensing laws imposing a prior restraint on speech activity. The first holds that "the prior restraint of a license" for speech activities is unconstitutional if the law fails, on its face, to set forth "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth, supra*, 394 U.S. at 151. Thus, licensing laws affecting speech have been stricken whenever the criteria for granting or denying the license conferred *any* subjective discretion on the licensor.[4]

A second line of cases commenced with *Freedman v. Maryland*, 380 U.S. 51 (1965), where this Court held that a law licensing speech which lacks certain procedural safeguards "contains the same vice as a statute delegating excessive administrative discretion." *Id.* at 57. Specifically, *Freedman* held that even if such a law contained adequate limitations on the licensor's substantive discretion, it must be found facially invalid as an impermissible prior restraint if it lacks any of the following procedural safeguards:[5]

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[4] See the cases cited in footnote 3, *supra*.

[5] That the *Freedman* opinion was not in any way dependent upon the presence of any impermissible licensing criteria is clear from the Court's statement that "we have no occasion to decide whether the vice of overbroadness infects the Maryland statute." 380 U.S. at 56.

1. Mandatory *judicial* review of any administrative decision to deny a license. 380 U.S. at 58.

2. The licensor must have the burden to seek judicial review in the event a license is denied. *Id.*

3. The licensor must have the burden of proving that the license was denied for proper reasons. *Id.*

4. A requirement that within a "specified brief period" the licensor must either issue the license or file a court action to justify the denial. 380 U.S. at 59.

5. A required "prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.*

Freedman held that "[w]ithout these safeguards, it may prove too burdensome to seek review of the censor's determination." *Id. See also, City of Lakewood v. Plain Dealer Publishing Co.*, ___ U.S. ___, 108 S.Ct. 2138, 2144 and 2151 (1988). The *Freedman* opinion also observed that a licensing scheme for speech-related businesses which lacks the articulated procedural safeguards establishes "a statutory context in which judicial review may be too little and too late" (380 U.S. at 57) and that "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." 380 U.S. at 58.

Although the licensing scheme in *Freedman* required the prior submission of individual films to a board of censors for pre-exhibition approval, this Court's subsequent opinions have made clear that *Freedman*'s procedural safeguards apply not only whenever First Amendment freedoms are subjected to the prior restraint

of a license requirement,[6] but indeed whenever *any* form of prior restraint affects protected expression.[7]

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[6] See, *e.g.*, *Riley v. National Federation of the Blind of North Carolina, Inc.*, ___ U.S. ___, 108 S.Ct. 2667, 2680 (1988) (*Freedman*'s procedural safeguards apply to a content-neutral permit requirement for professional fundraisers); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (*Freedman*'s procedural requirements apply to an application by a theatrical production company for use of municipal concert hall); and *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (ordinance establishing film censorship board violated *Freedman* where 50-57 days were allowed to obtain a final administrative decision and there was no provision for a prompt and final judicial ruling). *Cf.*, *City of Lakewood v. Plain Dealer Publishing Co.*, *supra*, ___ U.S. ___, 108 S.Ct. 2138 (1988), recognizing that a litigant is constitutionally entitled to make a facial challenge, rather than a mere "as applied" challenge, to periodic and content-neutral licensing laws requiring a business license to engage in speech activity. Although the merits of the challenge presented in that case involved a law which gave the licensor substantial discretion, this Court's opinion intimated that the ordinance could not, in any event, survive a *Freedman* analysis. See 108 S.Ct. at 2151.

[7] *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (holding *Freedman*'s procedural safeguards applicable to a judicial prior restraint imposed by the issuance of a preliminary injunction of indefinite duration against the exhibition of allegedly obscene materials); *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981) (affirming without opinion court of appeals' judgment striking down Washington's moral nuisance statute because it authorized imposition of a judicial prior restraint (injunctive orders) but lacked the procedural safeguards of *Freedman*); *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (judicial injunction prohibiting a parade on city streets violated *Freedman* because there was no requirement for immediate judicial appellate review); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (*Freedman*'s

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Most recently, in *Riley v. National Federation of the Blind of North Carolina, Inc.*, ___ U.S. ___, 108 S.Ct. 2667, 2680 (1988), this Court held that the procedural safeguards of *Freedman* applied to a content-neutral licensing requirement for professional fund raisers. As in *Freedman*, the *Riley* opinion noted that its procedural holding was independent of any problems the ordinance might have had based upon overbroad or discretionary licensing standards. 108 S.Ct. at 2680, n. 14. *Riley* held that the solicitation licensing requirement was impermissible not only because it failed to require the licensor to go to court to justify the denial of a license, but also because the ordinance did not "on its face . . . purport to [limit the time period within which] a determination must be made [by the licensor]." 108 S.Ct. at 2680.

Moreover, in a statement that would seem to be dispositive of the standard of review applicable here, this Court, in discussing the applicability of *Freedman*'s procedural safeguards, cited its earlier opinion in *Lakewood v. Plain Dealer, supra*, for the proposition that strict scrutiny under *Friedman* is required whenever "a state enacts a statute requiring periodic licensing of speakers, at least when the law is directly aimed at speech." *Riley, supra*, 108 S.Ct. at 2680. Accordingly, strict scrutiny must apply in the present case because Dallas has enacted an ordinance requiring periodic licensing of a variety of

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procedural requirements apply to seizures of allegedly obscene photographs by customs officials); *Blount v. Rizzi*, 400 U.S. 410 (1971) (*Freedman*'s safeguards required for seizures of allegedly obscene materials by postal authorities).

communicative businesses. The policy reasons for imposing such scrutiny are even greater in the present case because in *Lakewood* and in *Riley* the permit requirements were content-neutral (*i.e.*, in *Lakewood* they applied to *all* newsrack operators regardless of content; in *Riley* they applied to all professional fundraisers, regardless of viewpoint). In contrast, the licensing ordinance at issue here applies *only* to businesses which feature "adult" entertainment. Surely, no lesser standard of review can apply where, as here, a license law is required for those engaged in a particular type of governmentally-disfavored speech, *i.e.* sexually oriented expression.

In sum, this Court's prior decisions have never once deviated from the Framers' fundamental First Amendment precept that licensing requirements for speech are *inherently* suspect and must always be subjected to the strictest standards of judicial review to ensure that a hostile government cannot use them as tools for censorship. The Court of Appeals' decision in this case, applying a deferential standard of review, not only conflicts with this Court's settled precedent, but, if adopted by this Court, would utterly gut the protections of the First Amendment as intended by the Framers.

The Court of Appeals' opinion is also aberrational with respect to this Court's decisions defining "time, place and manner" regulations of speech. The panel majority asserted that *Freedman*'s strict scrutiny was not required because this licensing law implemented *other* provisions of the city code which, in fact, may constitute legitimate time, place and manner restrictions, *e.g.*, the adult zoning provisions of § 41A-13. However, as noted in dissent by Judge Thornberry, a licensing law is *not* a

time, place or manner restriction because it leaves open no alternative channels of speech. Rather, it prohibits the license applicant from engaging in the desired speech at any time, in any place and in any manner.

The latter distinction was first recognized by this Court in *Lovell v. City of Griffin, supra,* 303 U.S. 444, 451 (1938) when it struck down an ordinance requiring a license to distribute literature within city limits. This Court pointed out that there is "no restriction in its application with respect to time or place" and that "[t]he ordinance prohibits the distribution of literature . . . at any time, at any place, and in any manner without a permit from the city manager" (*id.*), precisely as § 41A-4(a) of the Dallas City Code does.

Finally, as a matter of both history and policy, it is imperative that this Court not accept the lesser standard of review employed by the panel majority. The *history* of the First Amendment is that licensing requirements for speech-related activities were at the very heart of the Framers' concerns when they enacted the First Amendment. If such laws are to be permitted at all (*but see Lovell v. City of Griffin, supra*), the only way to be true to the Framers' intent is to continue to require that ordinances establishing such licensing requirements must not only be narrowly drafted, but also must contain the procedural safeguards necessary to ensure that, in practice, the licensing procedure does not become so burdensome, onerous or time-consuming that judicial relief would come "too little or too late."

As a *policy* matter, there can hardly be imagined a licensing law more in need of *Freedman*'s procedural

safeguards than one that is specifically directed to those engaged in a particular type of protected speech opposed by many municipal authorities, *i.e.* sexually oriented expression. That circumstance presents the *most likely* situation in which the absence of procedural safeguards will result in the suppression of constitutionally protected expression. As will be discussed below, the Dallas licensing scheme's lack of procedural safeguards causes it to be rife with opportunities for extremely pernicious and repressive forms of administrative censorship.

B. The Dallas Licensing Ordinance Lacks Virtually Every Procedural Safeguard Which Is Mandated By The First Amendment.

The Dallas ordinance lacks every one of the five *Freedman* procedural safeguards. It contains no requirement of mandatory judicial review of a license denial; it does not impose on the licensor the obligation to seek judicial review in the event a license is denied or revoked; nor is the licensor assigned the burden of justifying the denial or revocation.

Of perhaps the greatest significance, the ordinance does not set forth a "specified brief period" within which the licensor must "either issue the license or go to court." 380 U.S. at 59. While § 41A-5(a) provides a 30-day time limit for the *issuance* of the license, it does not provide a comparable time for the licensor to go to court after a denial. Moreover, it doesn't even impose a time limit for a final *denial* of the license: "The Chief of Police shall *approve* the issuance of a license . . . within 30 days after receipt of an application *unless* he finds," *inter alia*,

that "[t]he premises . . . have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances." (§§ 41A-5(a) and 41A-5(a)(6).) Thus, if those other agencies have not gotten around to acting on the application, the Chief *may not* issue the license. Yet, there are *no* time limits imposed upon the health department, the fire department, or the building official to act on a license application. The net result is that if the health department, fire department or building official have failed to act within 30 days, the ordinance *deprives* the Chief of Police of the *power* to grant the license, yet the ordinance imposes no duty upon him to deny it at that time (nor could it impose such a duty since there has not yet been any necessary indication of disapproval by the health department, the fire department or the building official).

Not only does the ordinance leave the time for the Chief of Police to deny a license open-ended (thereby precluding any guarantee of prompt judicial review), it also forces the applicant to await for an indefinite period the outcome of an additional level of required administrative review. Under § 41A-11, a party who has had his or her license denied, suspended or revoked must appeal the decision of the Chief of Police to a permit and license appeal board in order to exhaust available administrative remedies. That board is then given an additional 60 days before it is even required to *hear* the appeal (see § 2-96(b) set forth at J.A. 39) with no requirement that it render a final administrative determination thereafter within any specified or brief period.[8] Throughout this time period,

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[8] See *Teitel Film Corp. v. Cusack, supra*, 390 U.S. at 141-142 (the time-consuming requirement of a mandatory administrative

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rights of protected expression are throttled solely on the basis of an administrative decision by the Chief of Police. As a result, the licensing scheme not only fails to impose the burden on the licensor to seek judicial review within a specified brief period after the application is filed, but it gives the licensor a virtually unlimited period of time to arrive at a final judicially reviewable decision.

Finally, the ordinance fails to provide for any type of *expedited* judicial review. As this Court pointed out in *National Socialist Party v. Village of Skokie, supra,* 432 U.S. 43 (1977), in the absence of "immediate appellate [judicial] review . . . the state must instead allow a stay." *Id.* at 44. However, in most circumstances the Dallas licensing scheme does not allow any sexually oriented businesses to operate while any judicial or administrative licensing proceedings are pending even before the *trial* court,[9] nor is there any guarantee that any judicial review that might be available (either in the trial court or on direct appeal) will be required in "the shortest fixed period compatible with sound judicial resolution." *Freedman, supra,* 380 U.S. at 39.

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appeal of a film license denial resulted in a "specified" period of pre-judicial restraint that was excessive, in violation of *Freedman*).

[9] There is no mandatory stay while an order denying a license is being appealed. Revocation and suspension orders become effective only after they are upheld by the Permit and License Appeal Board. However, thereafter the revoked licensee's business must immediately close and there is no provision for a mandatory stay pending judicial review.

As demonstrated above, the Dallas licensing scheme lacks each and every one of the five procedural safeguards which *Freedman* articulated in order to ensure that judicial review does not come "too little and too late." Yet, the burden on the City to provide such minimal safeguards is not severe. In at least two other regulatory schemes, the City has established systems for licensor-initiated judicial review.[10] That the City did not choose to employ those safeguards when it enacted its new sexually oriented business licensing law is perhaps telling of the City's true intentions in enacting this onerous ordinance. Certainly where, as here, the subjects of a licensing requirement (i.e., sexually oriented businesses) have historically been met with extreme hostility by many municipal officials, the need for *Freedman*'s procedural safeguards are heightened, not lessened.

For all the reasons above, the license requirement of Dallas City Code § 41A-4(a) must be stricken on its face as an unconstitutional prior restraint of protected expression.

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[10] See, *e.g.*, § 46-16 of the Dallas City Code (set forth at J.A. 91) providing for licensor-initiated judicial review within three days after adverse decisions of the motion picture classification board established under § 46-14 (J.A. 87). Similarly, under § 51-7.705 (reproduced at J.A. 48-49), there is mandatory licensor-initiated judicial review within three days after an individual seeking approval of a sign notifies the City that it disagrees with the City's determination that the sign is illegal because it bears a "commercial message."

II

IN PROVIDING FOR LICENSE DENIAL AND REVOCATION ON THE BASIS OF PRIOR SPEECH OFFENSES, THE DALLAS ORDINANCE IMPOSES A CLASSIC PRIOR RESTRAINT OF THE TYPE PROHIBITED AS FACIALLY UNCONSTITUTIONAL UNDER THE RULE OF *NEAR V. MINNESOTA*, 283 U.S. 697 (1931).

Over half a century ago in *Near v. Minnesota ex. rel. Olson*, 283 U.S. 697 (1931), this Court formulated one of the most unequivocal rules of constitutional law: past instances of unprotected speech cannot justify a prior restraint upon unknown and presumptively protected future expression.

Citing *Near*, Justice O'Connor observed in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 583, n.6 (1983):

> "[W]hen we . . . have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone. Prior restraints, for instance, clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect."

The Dallas licensing ordinance at issue here authorizes the denial or revocation of the special licenses required for "sexually oriented businesses" on the basis of prior unprotected expression, *e.g.*, a single obscenity offense. Where a license is required before one may engage in speech, "[t]he denial of a license to engage in speech is . . . the classic prior restraint." (Concurring and dissenting opinion of Judge Thornberry in this case below, 837 F.2d at 1306.) If anything, the evil of the prior restraint is at its worst when, as here, the restraint is

predicated upon past speech which has incurred official wrath – the classic *Near* situation.

This Court recognized in *Near* that in reaction to the censorial "power of the licenser" in England, the Framers designed the First Amendment above all else "to prevent previous restraints upon publication." 283 U.S. at 713. A long line of this Court's landmark free speech decisions reaffirms that the First Amendment embodies the Framers' inveterate hostility toward the prior restraint, "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976); *see also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Under this ordinance, a special license is required to operate any communicative business which disseminates sexually oriented materials. § 41A-4. The ordinance mandates *denial* of the required license to persons (or those who reside with persons) who have been convicted of any of a long list of criminal offenses, including obscenity or exposure of "harmful material to [a] minor." § 41A-5(a)(10)(A)(ee), (ff). This disqualification from the right to engage in protected First Amendment activity continues for two years for a single misdemeanor speech crime, and five years for multiple misdemeanor offenses or for a felony. § 41A-5(a)(10)(B). Likewise, the ordinance authorizes *revocation* of a license if the licensee is convicted of an obscenity or "display to minors" offense, or if any employee of the business is convicted of two such offenses occurring on the licensed premises within a year. § 41A-10(b)(5),(6). These license denial and revocation provisions, when predicated upon past instances of

unprotected speech, represent precisely the sort of prior restraint this Court held in *Near v. Minnesota* to be susceptible of no possible saving justification.

In *Near*, this Court invalidated an injunction prohibiting a publisher from issuing future editions of his "scandalous" *Saturday Press*, or any other "scandalous and defamatory" publication, pursuant to a statute allowing such a publication to be "wholly abated" as a "nuisance." 283 U.S. at 701-705, 722-723. As the Court later summarized *Near* in *Kingsley Books v. Brown*, 354 U.S. 436, 445 (1957): "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. . . .'[T]his is of the essence of censorship.'" Quoting from *Near*, 283 U.S. at 713.

Near v. Minnesota addressed and rejected essentially every argument which governments continue to advance in defense of prior restraints like this licensing scheme. The City argued below that this ordinance is to be judged by its statement of purpose. In *Near*, however, the Court emphasized that laws alleged to abridge free speech must be analyzed with "regard to substance and not to mere matters of form[;] . . . the statute must be tested by its operation and effect." *Id.* at 708. This Court has often been required to reaffirm this essential principle, as in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981): "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." See also *Washington v. Davis*, 426 U.S. 229, 243 (1976) ("the operative effect of the law rather than its

purpose is the paramount factor"). It is therefore irrelevant how the law's proponents may seek to characterize either the purpose of the statute, the activity subjected to regulation, or the remedy imposed.

Even if the City's proposed justification were relevant there, it would run afoul of the prior restraint doctrine. The announced purpose of the Dallas ordinance in providing for license revocation on the basis of such prior convictions is to deny the licensee the "opportunity" to repeat the crime. Preamble to Ordinance 19196.[11] The District Court noted approvingly that the license denial and revocation provisions are intended "to avoid licensure of those who have recently shown a predilection toward . . . criminal conduct . . . ." *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1074, n. 34 (N.D.Tex. 1986). Yet this overbroad means of preventing future speech crimes is precisely what the Court prohibited in *Near*, emphatically rejecting the asserted justification "that prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression of the evils of scandal.'" 283 U.S. at 711. The First Amendment requires that our laws "punish the few who abuse rights of speech *after* they break the law" rather than "throttle them . . . beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

As part of its rationale for applying a diminished standard of review to this ordinance, the Court of Appeals in this case concluded that normal First Amendment protections "are less important when a regulation

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[11] App. to Cert. Petition in No. 87-2012 at 73.

restricts the conduct of an ongoing commercial enterprise." 837 F.2d 1298, 1303. Yet, since *Near* this Court has repeatedly rejected such an approach: "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." 283 U.S. at 720. Similarly, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, n. 23 (1978), the Court observed: "It is too late to suggest 'that the dependence of a communication on the expenditure of money . . . operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 16 (1976)). *Accord, Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (rejecting the argument that a lesser standard of review should apply to a motion picture licensing law on the basis of the regulated theaters' commercial nature).

This Court reiterated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), that "mere labels" confer "no talismanic immunity from constitutional limitations." First Amendment scrutiny unquestionably applies whether an obscenity offense is said to create a "nuisance" or to constitute "racketeering activity," as this Court most recently held in *Fort Wayne Books v. Indiana*, 109 S.Ct. 916, 929 (1989): "the State cannot escape the constitutional safeguards of our prior cases by merely recategorizing . . . obscenity violations as 'racketeering.'"

Nor does the form of the *remedy* affect the application of First Amendment standards: "As far back as the decision in *Near v. Minnesota* . . . , this Court has recognized that the way in which a restraint on speech is 'characterized' under State law is of little consequence." *Id.* Under *Near*'s realistic scrutiny of the law's "operation and effect," it would not have mattered if the State had

revoked Near's license or obtained forfeiture of his publishing facilities as a means of stifling future publication of his *Saturday Press*, instead of enjoining its continued publication. This Court rejected the argument that a remedy which directly restrains future speech, however labeled, can be justified on grounds that it is mere "punishment" for having uttered unprotected expression:

> "The object of the statute is not punishment in the ordinary sense, but suppression of the offending newspaper or periodical.
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> • • •
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> "The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship." 283 U.S. at 711-712.

Likewise, the Dallas ordinance operates both to suppress the "offending" cabaret, bookstore, or other communicative business in retaliation for unprotected speech, and to place persons denied licenses under effective censorship whereby they may not engage in protected expression.

The Dallas ordinance does not represent the first attempt by government to deal with troublesome speech or attendant evils more "efficiently" by broadly foreclosing future expression, in lieu of the "sensitive tools" required by the First Amendment. Of particular relevance here, the reported cases demonstrate that for at least the past twenty years, states and localities have endeavored under various legal devices to close down adult entertainment businesses. On grounds that adult bookstores or theaters have disseminated materials subsequently adjudicated obscene, prosecutors have padlocked them as "nuisances" or as "racketeering enterprises," and cities have denied or revoked their business licenses. In scores

of state and federal jurisdictions, our lower courts have resoundingly rejected these measures as classic prior restraints of the type clearly prohibited under *Near v. Minnesota*.[12] In this regard, then, the *Dallas* ordinance

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[12] The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 164-166 (5th Cir. *en banc* 1978) [as to this particular point, all 14 judges of the en banc court were in agreement], aff'd. on other grounds, 445 U.S. 308 (1980); *Pollitt v. Connick*, 596 F.Supp. 261, 269-272 (E.D.La. 1984); *General Corp. v. Sweeton*, 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904 (1976); *People ex rel. Busch v. Projection Room Theater*, 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 (1976) cert. den. 429 U.S. 922 (1976); *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla.1971); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *People v. Sequoia Books*, 165 Ill.App.3d 143, 518 N.E.2d 775 (Ill.App.1988), *aff'd.*, ___ N.E.2d ___ (Ill. 1989); *State ex rel. Blee v. Mohney Enterprises*, 289 N.E.2d 519 (Ind.App.1973); *Kansas v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976); *Giarrusso v. D'Iberville Gallery*, 295 So.2d 891 (La.App. 1974); *Gulf States Theaters of Louisiana v. Richardson*, 287 So.2d 480 (La. 1974); *Parish of Jefferson v. Bayou Landing Ltd., Inc.*, Inc., 350 So.2d 158 (La.1977); *Society to Oppose Pornography, Inc. v. Thevis*, 255 So.2d 876 (La.App. 1972); *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Commonwealth ex rel. Davis v. Van Emberg*, 347 A.2d 712 (Penn. 1975); and *New Rivieria Arts Theatre v. Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967). See also *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 494-495 (9th Cir. 1984), rev'd. on other grounds sub nom. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Nihiser v. Sendak*, 405 F.Supp. 482, 491-492 (N.D.Ind. 1974), vacated and remanded on other grounds, 423 U.S. 976 (1975), order re-entered August 16, 1976 (unpub.), *aff'd.* 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd*, 420 U.S. 592, 612, n. 23 (1975); cf. *Speight v. Slaton*, 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Ohio 1974).

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stands in defiance of *Near* and of contemporary controlling decisions which had seemingly resolved this very issue, particularly in the Fifth Circuit.[13]

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The following cases have held unconstitutional laws which allow a license or permit to be either revoked or denied upon a prior obscenity violation: *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *Genusa v. City of Peoria*, 619 F.2d 1203, 1217-1220 (7th Cir. 1980), *aff'g.* 475 F.Supp. 1199, 1207-09 (C.D.Ill. 1979); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Cohen v. City of Daleville, Alabama*, 695 F.Supp. 1168 (M.D.Ala. 1988); *Bayside Enterprises, Inc. v. Carson*, 470 F.Supp. 1140 (M.D.Fla. 1979); *San Juan Liquors v. Consol. City of Jacksonville* 480 F.Supp. 151 (M.D.Fla. 1979); *Yuclan Enterprises Inc. v. Arre*, 488 F.Supp. 820 (D.Hawaii 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F.Supp. 994 (S.D.N.Y. 1972); *Natco Theatres Inc. v. Ratner*, 463 F.Supp. 1124 (S.D.N.Y. 1979); *Oregon Bookmark Corp v. Schrunk*, 321 F.Supp. 639 (D.Oregon 1970); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980); *Perrine v. Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz Co., Bd. of Sup'rs.*, 128 Cal.App.3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); *City of Delevan v. Thomas*, 31 Ill.App.3d 630, 334 N.E.2d 190 (1975); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (Minn. 1975); *Hamar Theatres Inc. v. City of Newark*, 150 N.J.Super. 14, 374 A.2d 502 (1977); *People v. J.W. Productions*, 413 N.Y.S.2d 552 (N.Y.C.Cr.Ct. 1979); *City of Seattle v. Bittner*, 81 Wash.2d 747, 505 P.2d 126 (1973); see also *International Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-833 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-630, 632 (5th Cir. 1981); *cf. Chulchian v. City of Indianapolis*, 477 F.Supp. 128, 131-132 (S.D.Ind. 1979), *aff'd.*, 633 F.2d 27, 30 (7th Cir. 1980); *Marks v. City of Newport, Ky.*, 344 F.Supp. 675 (E.D.Ky. 1972).

[13] *See Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 165-166 (5th Cir. *en banc* 1978), ignored by the majority below

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Addressing a similar license revocation law, the court in *Cornflower Entertainment, Inc. v. Salt Lake City*, 485 F.Supp. 777, 786 (D.Utah 1980) observed: "To reason that an involuntary closure of a motion picture theatre for past obscenity violations does not constitute a prior restraint is clearly contrary to the Supreme Court's definition of prior restraint." Virtually every court to address this issue has applied *Near*'s prohibition of this type of restraint as utterly beyond dispute, as did the Court of Appeals in *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1552 (5th Cir. 1983), striking down just such an ordinance providing for the one-year revocation of a theater's or bookstore's license upon conviction for obscenity:

> "[T]he City can no more impose such a prior restraint on the plaintiff than it could by ordinance restrain a citizen from speaking in public for one year because the citizen once uttered an obscenity in a public place."

The correctness of this avalanche of lower court authority has been underscored by this Court's continued elaboration upon the doctrine established in *Near* in the many cases invalidating prior restraints in their various forms. *See, e.g., Lovell v. City of Griffin*, 303 U.S. 444 (1938);

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although clearly dispositive of the license denial/revocation issue. *Cf. Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777, 785-786 (D. Utah 1980) (citing the Court of Appeals' *en banc* decision in *Vance* as authority for invalidating ordinance permitting revocation or suspension of theater licenses on the basis of obscenity convictions).

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); *New York Times v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

In *Vance v. Universal Amusement Co., supra*, this Court affirmed an *en banc* Fifth Circuit decision which struck down a Texas public nuisance statute authorizing preliminary injunctions of indefinite duration against the future exhibition of unnamed "obscene" materials by those who had committed a prior obscenity violation. Both this Court and the lower courts deemed this procedure a prior restraint devoid of First Amendment safeguards. The Court of Appeals in *Vance* had also addressed another statutory provision which was not appealed to this Court, the nuisance statute's abatement provision which apparently authorized closure of any errant theater which had exhibited an obscene film.

> "Thus, future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in *Near v. Minnesota*." *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 165 (5th Cir. *en banc* 1978).

Because "[a]pplication of the one-year closing provisions in obscenity cases under the Texas nuisance statutes would constitute an impermissible prior restraint," the Court of Appeals construed the padlocking statute as inapplicable to obscenity violations. 587 F.2d at 166.

The point is not simply that these license disqualification provisions should have been invalidated under

the Court of Appeals decision in *Vance* and an immense, virtually unanimous body of decisions from other jurisdictions, but more fundamentally that those decisions were compelled by this Court's unswerving adherence to the rule announced in *Near*, a rule which embodies the paramount concerns sought to be protected by the First Amendment. As Justice O'Connor emphasized in *Minneapolis Star, supra*, 460 U.S. at 583, n.6 (1983), such prior restraints "strike to the core of the Framers' concerns," and conclusively so in cases of an absolute prospective bar on *protected* speech.

Unfortunately, governments will persist, as here, in urging this Court to "pull one thread" from the protective fabric of established civil liberties, in furtherance of their efforts to regulate on behalf of what they deem to be other, more important public interests. As is so often the case, however, a law aiming at those involved in what the district court deemed "unpopular" expression[14] poses the danger of unraveling that garment which protects us all. In this case, one of the doctrinal threads inconveniencing the City of Dallas is the rule of *Near v. Minnesota*, the very bedrock of the constitutional protection of free speech. If that rule is to remain in effect, the Dallas ordinance in this respect must be unequivocally condemned as the forbidden "essence of censorship."

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[14] 648 F.Supp. at 1063.

III

LICENSE DENIAL, SUSPENSION AND REVOCATION ON THE BASIS OF NON-SPEECH VIOLATIONS ALSO REPRESENT PRIOR RESTRAINTS WHICH CANNOT WITHSTAND STRICT SCRUTINY AND ARE THEREFORE INVALID UNDER THE FIRST AMENDMENT.

In addition to its paradigm *Near* restraint for past unprotected speech, Dallas' licensing scheme authorizes officials to deny, suspend or revoke their "permission" to engage in First Amendment activity on the basis of any number of other crimes and assorted derelictions. Because the ordinance imposes a licensing requirement, and withholding the required license operates as an outright *ban*, rather than a mere *burden*,[15] on all future protected expression, these provisions as well must withstand the extremely strict scrutiny of the prior restraint doctrine. These censorial license disqualifications are neither narrowly tailored nor necessary to achieve a compelling governmental interest, and therefore must yield to the overriding First Amendment interests at stake.

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[15] Whereas any outright *ban* upon future speech comes to the courts facing "a heavy presumption against its constitutional validity," *Vance, supra*, 445 U.S. at 316, n.13, a *burden* upon speech *may* trigger strict scrutiny, depending upon its nature and extent. Examples of laws which burden speech but do not bar it completely include taxes and zoning laws. Even though these burdens do not effectuate a prior restraint, if taxes are imposed selectively or zoning laws "restrict in any significant way" the opportunity to speak, they too will encounter strict scrutiny and normally will be found impermissible. See *Minneapolis Star, supra; Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 78 (1976).

Under the Dallas ordinance, applicants will be *denied* a license if they, or someone with whom they reside, has been convicted of various enumerated offenses such as prostitution, public lewdness, sexual assault, or incest, within either two or five years. (See Argument II and § 41A-5(a)(10).) A license will be *revoked* for the subsequent commission of any of these crimes, either by the licensee or, under certain circumstances, by the business' employees. § 41A-10(b)5,6. The license may be *suspended* for, *inter alia*, the licensee's or an employee's "excessive use of alcoholic beverages" on the premises, and revoked for two suspensions within a year. § 41A-9(2); § 41A-10(a). In short, the ordinance provides city officials with an extensive variety of justifications for closing businesses engaged in officially disfavored speech.

These provisions trigger the most exacting First Amendment scrutiny because the ordinance imposes an absolute ban upon future protected expression; it therefore represents a prior restraint which bears a "heavy presumption against its constitutional validity." *Vance, supra*, 445 U.S. at 316, n.13. Under the strict scrutiny of the First Amendment, the City "must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231.

Given this required standard of analysis, the courts below clearly erred in applying a diminished standard of review in this case. As Judge Thornberry concluded in his concurring and dissenting opinion below:

> "Applying a time, place and manner analysis to a licensing statute that completely bans certain classes of persons from speaking is illogical . . . . A person

who is completely banned from speech because, for example, he has in the past been convicted of some crime has no other avenue of communication." 837 F.2d at 1310.

On this basis, Judge Thornberry correctly distinguished *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Respondents will undoubtedly rely upon the authority of *Arcara* in an attempt to justify these provisions for license denial and revocation on grounds of non-speech-related predicate acts or omissions.[16] Because this ordinance clearly creates a prior restraint implicating First Amendment interests, reliance upon *Arcara* in this situation is misplaced.

In *Arcara*, this Court upheld the application of a generally-applicable New York nuisance statute to padlock the premises of a bookstore for one year, because its proprietors had knowingly allowed the premises to be used for purposes of prostitution. This result was grounded fundamentally on the Court's conclusion that First Amendment analysis did not apply at all in *Arcara*, in part because of two key factors not present here. The Court emphasized that in the absence of these factors, First Amendment scrutiny would apply.

First, the padlocking in *Arcara* imposed the *burden* of moving to another location but did not directly *ban* or prohibit the continued operation of the bookstore as a

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[16] Of course, respondents cannot hope to use *Arcara* as authority for the proposition that a license could be denied for predicate *speech* offenses such as obscenity, because the Court in *Arcara* emphatically distinguished the case in which "it was conduct with a significant expressive element which drew the legal remedy in the first place." 478 U.S. at 706.

going concern. In contrast, the denial of a license under the Dallas ordinance imposes a complete *ban* upon protected expression, i.e., a prior restraint. The closure order in *Arcara* was narrowly directed only at the premises found to be the situs of on-going nuisance activity, and Chief Justice Burger stressed that the proprietors "remain free to sell the same materials at another location." *Id.* at 705. The direct and complete ban authorized by the Dallas ordinance, which entirely prohibits one denied a license from engaging in certain forms of protected speech activity at any location, is a qualitatively different kind of restraint upon First Amendment rights.

Second, Justice O'Connor's concurrence (which also represented a majority of the Court on this point) emphasized that if a law were used to close down a bookstore "because of the perceived secondary effects of having a purveyor of [indecent] books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review," i.e., in this case, the extremely exacting scrutiny of the prior restraint doctrine. Both courts below found that the entire ordinance, including its non-speech license disqualification criteria, was enacted because of the perceived secondary effects of having an adult bookstore or cabaret in the neighborhood. *See* 648 F. Supp. at 1064-1066; 837 F.2d at 1303. For this reason as well, these provisions "implicate First Amendment concerns and require [First Amendment] analysis." *Id.*

The applicable standard of First Amendment scrutiny had previously been faithfully applied both in the Fifth Circuit and elsewhere to invalidate this type of criterion

for license-denial either as conferring undue discretion or substantively as a prior restraint. In *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), this same Court of Appeals invalidated an ordinance requiring a license for the distribution of literature and solicitation of funds at the Dallas airport. The required permit could be denied on several grounds, including conviction of a felony or other offense "involving moral turpitude." The court struck the licensing scheme in its entirety for its lack of *Freedman* safeguards, and held more particularly that most of the grounds for permit denial were invalid either as involving undue discretion or as otherwise impermissible prior restraints:

> "[G]overnmental authorities may not, except in demanding circumstances, deny access to a public forum in anticipation of consequences that may flow from the contemplated activity. *Punishment for criminal behavior must be government's response to an abuse of the privilege to use a public forum; prospective restraints are unconstitutional.*" 663 F.2d at 628 (emphasis added).

Accordingly, the court concluded the provision for denial of a permit to persons convicted of crimes was patently invalid.

> "To sustain such a total abrogation of First Amendment rights, the government must show that the speech prohibited will 'surely result in direct, immediate and irreparable damage . . . ' [quoting *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971)]. *That the applicant has been convicted of a crime in the past is not a sufficient reason for his blanket exclusion in the future.*

* * *

> *"Persons with prior criminal records are not First Amendment outcasts." Id.* at 629-630 (emphasis added).

In striking down this Dallas ordinance, the *Fernandes* court followed an earlier Fifth Circuit decision, *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979), invalidating analogous permit revocation portions of a similar ordinance governing solicitation at the Atlanta airport. To revoke a permit for violations under the airport ordinance, the court held, "is simply a recipe for an unlawful prior restraint." 601 F.2d at 832. The Court held that the City could not possibly justify a prior restraint by asserting

> "that once a sinner, always a sinner; anyone who has violated the ordinance once is likely to violate it again. We have recently held, en banc, that no prior restraint may be based on this broad generalization." *Id.* at 833, citing *Universal Amusement Co. v. Vance*, 587 F.2d 159, 165-66 (5th Cir. 1978).

In addition to these Fifth Circuit cases, indistinguishable in principle from the issue of license denial and revocation under the Dallas sexually oriented business ordinance, the Court of Appeals in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), addressed and invalidated materially identical provisions of an adult entertainment licensing ordinance. The Peoria ordinance provided for the denial, suspension or revocation of an adult bookstore license to anyone convicted during the preceding four years of any felony, any prostitution-related offense, any obscenity-related offense, or any offense "opposed to decency and morality." 619 F.2d at 1218.

The Court of Appeals in *Genusa* rejected outright these provisions "totally prohibit[ing] certain classes of persons from selling in Peoria books that are protected by the First Amendment." *Id.* at 1218-1219. The court first rejected as unsubstantiated the City's assertion "that those who have committed past crimes or offenses are more likely to commit them again, and that the prohibition of the ordinance will, by keeping the past offender and the adult use separate, cause a decrease in crime." *Id.* at 1219. Even if this broad empirical assertion were proved, the court doubted these contentions could "legitimize the broad prior restraint on First Amendment freedoms that the ordinance seeks to impose." *Id.*

> "We know of no doctrine that permits the state to deny a person First Amendment liberties . . . solely because that person was once convicted of a crime or other offense." *Id.* at 1219, n.40.

Again, these decisions of the Courts of Appeals are discussed not merely to point out the radical departure of the courts below from the established precedent of their own circuit, nor to suggest that their authority binds this Court. Rather, these cases represent the faithful application of First Amendment principles announced by this Court, fundamental constitutional groundrules which compel a result contrary to that reached by the Court of Appeals in this case. The Dallas ordinance's provisions for prospectively denying the right to speak cannot by any means withstand strict scrutiny under the First Amendment and particularly under the prior restraint doctrine.

As the courts concluded in *Fernandes, Eaves,* and *Genusa,* a broad prospective restraint on the ability to

participate in protected First Amendment activity simply cannot be justified as a narrowly tailored or necessary means to achieve the City's crime-prevention objectives. In many such cases, there will in fact be no nexus at all between the prior crime and the licensee's operation of an expressive business; nor will denial of a license logically operate to deter future criminal conduct. The connection between the criminal offenses and operation of a communicative business is far too tenuous to support a total restraint on protected expression.

In sum, the City has not demonstrated – and could not demonstrate – that its purpose of preventing the enumerated crimes cannot be more narrowly achieved by enforcement of the criminal laws rather than by withdrawing the privilege to engage in First Amendment activities. The exercise of First Amendment freedoms is simply deemed too precious a right under our constitutional system to allow for this kind of broad pre-emptive strike in an effort to anticipate, under loosely-supported assumptions, future criminal conduct which may or may not occur. Accordingly, these license disqualification provisions must be stricken as impermissible prior restraints.

IV

THE DALLAS LICENSING REQUIREMENT IS SO RIDDLED WITH UNCONSTITUTIONAL FEATURES THAT IT MUST BE STRICKEN IN ITS ENTIRETY.

Although petitioners originally brought these lawsuits challenging a wide variety of features in Chapter 41A of the Dallas City Code, the only issues remaining

before this Court concern the constitutionality of the licensing requirement of § 41A-4(a). Petitioners respectfully submit that the only appropriate remedy would be the facial invalidation of that requirement.

First, the absence of *Freedman* procedural safeguards from the licensing scheme alone requires its facial invalidation *en toto*. However, even apart from the ordinance's *Freedman* problems, it would have to be facially invalidated for substantial overbreadth in any event. Where, as here, "the overbreadth of [a] statute, in relation to its legitimate reach, is substantial[, it] warrants a declaration of facial invalidity." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, n.12 (1985). Separate from its *Freedman* deficiencies, this licensing law is so riddled with unconstitutional features that its overbreadth is indisputably substantial compared to its legitimate reach.

As discussed in Point II, the various provisions for license denial, non-renewal, suspension or revocation due to prior speech offenses are patently unconstitutional under *Near v. Minnesota, supra*. Similarly, the comparable provisions justifying denial, etc., based on prior non-speech offenses are equally impermissible because they also operate as prior restraints and do not constitute the least restrictive means of accomplishing any compelling state interests.

However, even apart from those defects, the ordinance is virtually saturated with additional clearly unconstitutional features. First, it is replete with *discretionary* substantive licensing criteria, the most notable of which are listed below:

1. Sections 41A-9(5) and 41A-5(a)(8), allow the Chief of Police to suspend or deny a license, respectively, where the licensee or applicant has, in the subjective and sole opinion of the chief, "demonstrated that he is unable to operate . . . a sexually oriented business in a peaceful and law-abiding manner . . . ."

2. The chief has discretion under § 41A-9(2) to suspend a license if he is of the opinion that the licensee or an employee has "engaged in excessive use" of alcohol while on the premises.

3. Under § 41A-5(a)(3), the Chief of Police has discretion to deny a license if, in his opinion the applicant has "failed to provide information 'reasonably necessary' for issuance of the license."

4. Under § 41A-8(b), renewal of a license after a prior renewal application has been turned down is only discretionary, not mandatory, *even after the basis for the prior denial has been corrected*!

5. Similarly, under § 41A-10(e), reinstatement of the license after revocation is only discretionary, not mandatory, *even after the basis for revocation has been corrected*!

Each of the foregoing provisions provides the Chief with subjective and discretionary criteria which may be utilized for the wrongful denial or nonrenewal of a license, notwithstanding this Court's last term reiteration that periodic licensing laws for businesses engaged in speech activities must be stricken on their face as unconstitutional if they lack objective standards to limit the licensor's discretion. *City of Lakewood v. Plain Dealer, supra*. This Court noted that "[s]tandards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech." 108 S.Ct. at

2144. None of the three dissenting judges in *Plain Dealer* disagreed with these propositions. Instead, the dissent was exclusively based on the asserted absence of a First Amendment right to put a newsrack *on a public sidewalk*. The entire Court agreed that the *Lovell - Freedman* line of cases would apply where the First Amendment rights of a business are subjected to a license requirement. 108 S.Ct. at 2152-53, 55.

However, in the present case there is no question but that petitioners' sexually oriented communicative businesses are engaged in activity protected by the First Amendment. Accordingly, there would appear to be no dispute as to petitioners' entitlement to facially challenge these discretionary provisions. The applicable rule, then, is that stated by this Court in *Shuttlesworth v. City of Birmingham, supra*: "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." 394 U.S. at 150-151.[17] Other examples of patently unconstitutional provisions in this ordinance abound:

1. Under § 41A-8(a), an applicant seeking renewal must go through the full initial license application process set forth in § 41A-4. Nonrenewal of a license could then be justified for anything as minor as an inability to get approval of the building official because certain wiring might not be up to code (see § 41A-5(a)(6)). Yet, under

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[17] Accord *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 683 (1968) (holding that "[t]he vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing").

§ 41A-8(b) once such a renewal request is denied, the Chief is expressly forbidden from reconsidering the renewal for "at least 90 days" *even though he "finds that the basis for denial of the renewal license has been corrected or abated . . . ."* [Emphasis added.]

2. Similarly, under § 41A-10(e), a *revoked* license cannot be reinstated after "the basis for the revocation has been corrected or abated" until "at least 90 days have elapsed since the date the revocation became effective."[18]

3. A license cannot be granted under § 41A-5(a)(5) if the applicant merely *resides* with a person whose license was denied within the prior 12 months for any reason, including being overdue in paying any taxes or license fees (§ 41A-5(a)(2)), failing to meet any building, health or fire code requirements (§ 41A-5(a)(6)), or failing to provide all "information reasonably necessary." (§ 41A-5(a)(3)). *All of these conditions are easily remediable but the ban on licensure nonetheless goes on for a full year!* The arbitrariness and overbreadth of this section is additionally evidenced by the fact that this limitation results from licensing difficulties experienced by one with whom the applicant merely *resides*. [Yet, the City inexplicably did not impose a comparable restriction where it is the *applicant himself* who has had such prior licensing difficulties!][19]

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[18] Where the basis for revocation is a prior criminal conviction, the minimum period of revocation is even greater, either two or five years. See § 41A-10(e) and 41A-5(a)(10)(B).

[19] It is true, as mentioned above, that an applicant who has been denied *renewal* or whose license has been *revoked* must await a minimum 90 day period before seeking relicensure. However, as to those applicants seeking an initial license, the

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4. A license can also be denied (see § 41A-5(a)(9)), suspended (see § 41A-9(1)), or revoked (see § 41A-10(a)) if the applicant or licensee has violated the inspection requirements of § 41A-7. Under § 41A-7(a), the applicant is compelled to allow his or her premises to be fully inspected at any time it is occupied or open for business by a virtually endless list of public agencies. These include:

   (a) the police department,

   (b) the health department,

   (c) the fire department,

   (d) the housing and neighborhood services department,

   (e) the building inspection division.

This requirement for warrantless inspections by so broad a list of government agencies must be found deficient under the Fourth Amendment principles articulated by this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979) ("there is no basis for the notion that because a retail [adult book] store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees.")

In sum, the licensing law challenged in this case is so replete with constitutional deficiencies that the only

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City failed to impose upon them the same one year ban on relicensure as they have imposed on those applicants who reside with persons who have previously been denied a license. This is the epitome of arbitrariness and irrationality.

appropriate remedy is the facial invalidation of the licensing requirement of § 41A-4(a).

CONCLUSION

For all of the reasons above, this Court should reverse the order of the Court of Appeals and strike down the license requirement of Dallas City Code § 41A-4(a) on its face.

DATED: May 26, 1989 Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1988

NO. 87-2012

FW/PBS, INC., et al.,

Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 87-2051

M.J.R., INC., et al.,

Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,

Respondents

NO. 88-69

CALVIN BERRY, III, et al.,

Petitioners,

v.

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Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Does the temporary denial or revocation of a license to operate a sexually oriented business based on convictions for specified crimes that are demonstrated to proliferate in neighborhoods surrounding such businesses, impose a prior restraint on protected expression or improperly single out businesses engaged in First Amendment protected activities?

2. Are the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965), applicable to the license denial and revocation provisions of the Dallas sexually oriented business ordinance?

3. Do the provisions of the Dallas sexually oriented business ordinance relating to adult motels violate the First, Fourth, Fifth and Fourteenth Amendments or any constitutionally protected freedom of association?

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Nos. 87-2012, 87-2051, and 88-49

In The

Supreme Court of the United States

October Term, 1989

NO. 87-2012

FW/PBS, INC., et al.,

Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 87-2051

M.J.R., INC., et al.,

Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 88-49

CALVIN BERRY, III, et al.,

Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS CITY OF DALLAS, et al.

STATEMENT OF THE CASE

In the early summer of 1986, after a thorough investigation of the facts and law involved (DX 3), the City of Dallas began to consider specific means of regulating the deleterious effects of sexually oriented businesses upon the community.

The first formal consideration of a proposed ordinance occurred at a public hearing before the Dallas Plan Commission on June 12, 1986. After considering the experiences of at least eight other cities and counties (DX 3 and DX 5), the testimony of numerous citizens (DX 1 and DX 2 p. 2), and evidence concerning possible locations available under the ordinance (DX 15), the fifteen member Plan Commission voted unanimously in favor of adopting the ordinance. The transcript of the Plan Commission hearing shows that the Plan Commission was convinced that sexually oriented businesses cause harmful secondary effects to surrounding neighborhoods (DX 1 pp. 23, 49, 51-52, 57-58) and that the members of the Plan Commission were attempting to control these secondary effects and not the content of sexually oriented materials (DX 1 pp. 23, 48-52, 57).

The Dallas City Council considered the Plan Commission's unanimous recommendation as well as the eight municipal studies and the map indicating available locations. The City Council also considered a Dallas study which found a 90 percent higher crime rate near sexually oriented businesses than in other business areas (DX 19 and 20). On June 18, 1986, the Dallas City Council voted unanimously in favor of adopting Ordinance No.

19196, which added a new Chapter 41A (the Dallas ordinance) to the Dallas City Code.

In adopting the ordinance, the Council made legislative findings that sexually oriented businesses are frequently used for unlawful sexual activities, have a deleterious effect on surrounding businesses and neighborhoods, and cause increased crime and decreased property values.[1]

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[1] The Dallas City Council made the following findings:

(1) Sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature;

(2) that the city police have made a substantial number of arrests for sexually related crimes in sexually oriented business establishments;

(3) that concern over sexually transmitted diseases is a legitimate health concern of the city which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens;

(4) that licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation;

(5) that there is convincing documented evidence that sexually oriented businesses, because of their very

(Continued on following page)

The ordinance requires sexually oriented businesses to locate at least 1000 feet from a church, school, residential district, park adjacent to a residential district, a residential lot, or another sexually oriented business.

(Continued from previous page)

nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values;

(6) that sexually oriented businesses have serious objectionable operational characteristics particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in adjacent areas;

(7) that it is in the interest of public safety and welfare to prohibit persons convicted of certain crimes from engaging in the occupation of operating sexually oriented businesses;

(8) that the crimes listed in Section 41A-5(a)(10) are serious crimes which are directly related to the duties and responsibilities of the occupation of operating sexually oriented businesses;

(9) that the occupation of operating sexually oriented businesses brings a person into constant contact with persons interested in sexually oriented materials and activities thereby giving the person repeated opportunities to commit offenses against public order and decency should he be so inclined; and

(10) that a person who has been convicted of a crime listed in Section 41A-5(a)(10) is presently unfit to operate any sexually oriented businesses until the respective time periods designated in that section expire. (DX 16, pp. 1-5).

§ 41A-13(a) & (b). A three-year amortization period was provided for nonconforming uses. § 41A-13(f). Licensing requirements were imposed to assist in the enforcement of the ordinance.

Petitioners filed three separate complaints in the United States District Court for the Northern District of Texas, Dallas Division, challenging all aspects of the ordinance and seeking declaratory and injunctive relief. The three complaints were consolidated and the case was presented to the District Court on cross motions for summary judgment. The District Court found the ordinance constitutional except for four minor exceptions. Those provisions have since been deleted (See FW/PBS App. to Pet. for Writ of Cert., App. 103-111) and are not in issue here.

Petitioners appealed to the United States Court of Appeals, Fifth Circuit. The Court of Appeals upheld the constitutionality of the Dallas ordinance and rejected petitioners' challenge. Judge Thornberry concurred in part and dissented in part.

This Court on May 4, 1988, stayed the decision of the Court of Appeals except for its holding that the provisions of the ordinance regulating the location of sexually oriented businesses do not violate the Federal Constitution. On February 27, 1989, this Court granted petitioners' writs of certiorari limited to questions I, II and III in case No. 87-2012; questions 1 and 2 in case No. 87-2051; and both questions in case No. 88-49. All issues relating to the Dallas ordinance's locational restrictions were excluded from review.

SUMMARY OF ARGUMENT

I. The questions accepted for review in this case involve the right of a city to temporarily deny or revoke a license to operate a sexually oriented business because a person seeking or holding a license has been recently convicted of at least one of thirteen sexually related crimes. The Dallas ordinance, which has as its primary enforcement tool a restriction on the location of sexually oriented businesses, was adopted after examination of studies conducted in other cities which documented that sexually oriented businesses have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values. In response to these studies and to a report demonstrating higher levels of crime, especially sexually related crime, associated with these businesses in Dallas, the City Council adopted the ordinance to address the crime problem as well as the other deleterious effects of sexually oriented businesses.

Petitioners argue that the license denial and revocation provisions of the ordinance impose a prior restraint on constitutionally protected speech and do not provide required procedural safeguards. The enforcement of this ordinance, however, does not carry with it any of the attributes of prior restraint that are condemned in *Near v. Minnesota*, 283 U.S. 697 (1931), *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), or *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), the cases relied upon by petitioners for their assertion. No license is required for any speech, publication, or movie. The Dallas ordinance is not concerned with the content of materials or

services sold at a sexually oriented business; rather the purpose of the ordinance is to protect neighborhoods and reduce the crime associated with these businesses.

Since the ordinance regulates many types of sexually oriented businesses, including those which have no expressive activity associated with them, the assertion that businesses engaged in expressive activities are singled out for regulation and closure has no basis. Neither do the sexually related crimes used for disqualification single out expressive activity. Only three of the thirteen crimes are related to illegal expressive activity, i.e., obscenity; the sale, distribution, or display of material harmful to a minor; and possession of child pornography. See § 41A-5(a)(10), J.A. 18-19. It would be illogical for the city to exclude these sexually related crimes from the disqualifications simply because they involve unprotected speech. The use of obscenity as a predicate offense for government enforcement against sexually related businesses has been upheld in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. ___, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989). Conviction for obscenity as a temporary disqualification in the Dallas ordinance has less dire consequences upon the availability of expressive material than obscenity as a predicate offense in *Fort Wayne Books*. Under Indiana law, a RICO prosecution can result in forfeiture of materials, imprisonment, and a ban on conducting business.

Because those who operate sexually oriented businesses generally convey other peoples' messages, if one operator is forced to close because of criminal convictions, the amount of material available to the public will not be diminished. The demand for sexually oriented material and the likely competition for locations under

the location restrictions of the ordinance, will result in a new purveyor taking his place and, more than likely, buying his stock-in-trade.

Petitioners argue that the license denial and revocation provisions of the ordinance are defective because they do not provide the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965). These safeguards are required in cases involving a prior restraint on sale or publication. As previously argued, the Dallas ordinance does not have any of the attributes of prior restraint. Since the ordinance does not seek to suppress the content of any expressive material and nothing in the licensing scheme regulates the content of any expressive material, the Court of Appeals correctly held that "the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content." *FW/PBS, Inc. v. Dallas*, 837 F.2d 1298, 1303 (5th Cir. 1988) (See also, FW/PBS App. to Pet. for Writ of Cert., App. 1-30).

II. The Dallas ordinance is valid under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), as a content-neutral time, place, and manner regulation designed to serve a substantial government interest in protecting neighborhoods from the negative secondary effects of sexually oriented businesses while not unreasonably limiting alternative avenues of communication. If the license denial and revocation provisions are separated from the rest of the ordinance for analysis, the fact that they may not fit neatly into the time, place, and manner category should not deter the Court from analyzing them under the same standard since they meet the same criteria.

Application of the test established in *United States v. O'Brien*, 391 U.S. 367 (1968), to the license denial and revocation portion of the ordinance brings its validity into sharper focus. The substantial governmental interest in protecting neighborhoods surrounding sexually oriented businesses is unrelated to the suppression of free expression. The disqualification provisions are narrowly tailored to apply only to businesses which have been documented as causing adverse secondary effects, and only to the crimes which are most prevalent in and around these types of businesses. For these reasons, the license denial and revocation provisions of the ordinance are valid.

III. The adult motel petitioners are not regulated under the ordinance on the basis of any expressive activity but because they rent rooms for short periods of time. For this reason, the ordinance is valid as applied to them since it is rationally related to the city's legitimate interest in curbing prostitution and other sex-related crimes in the city's neighborhoods. Nevertheless, the studies relied upon by the city justify the regulation of any adult motels which do advertise the availability of sexually oriented movies or videos and are thus brought under the ordinance because of expressive activity. The rationale for including them in the regulations is the same as for adult motion picture theaters and adult arcades. The arguments of the motel petitioners do not substantiate any of their asserted constitutional claims, and the Court must uphold the adult motel provisions of the ordinance as valid.

ARGUMENT

I. THE LICENSE DENIAL AND REVOCATION PROVISIONS OF THE DALLAS SEXUALLY ORIENTED BUSINESS ORDINANCE DO NOT IMPOSE A PRIOR RESTRAINT ON THE DISSEMINATION OF CONSTITUTIONALLY PROTECTED EXPRESSION.

By refusing to accept for review any of the issues raised by petitioners concerning the location restrictions of the Dallas sexually oriented business ordinance, this Court has left standing the holdings from the lower courts regarding the validity of the underlying purpose and effect of the ordinance. The adult cabaret petitioners argue extensively that the licensing scheme as a whole in the Dallas ordinance is invalid. See Brief of Petitioners M.J.R., Inc., et al. at 9-21. This Court, however, accepted for review the narrow questions of whether the denial or revocation of a license on the basis of prior criminal convictions imposes a prior restraint or inevitably singles out persons engaged in First Amendment protected activity for regulation and closure.

A. The temporary denial or revocation of a license to operate a sexually oriented business based on convictions for crimes that are demonstrated to proliferate in neighborhoods surrounding such businesses is in furtherance of the city's substantial governmental interests and does not impose a prior restraint.

1. Enforcement of the license denial and revocation provisions in the Dallas sexually oriented business ordinance does not resemble the enforcement activity in other cases where the Court has found a prior restraint.

Petitioners rely on *Near v. Minnesota*, 283 U.S. 697 (1931), and *Vance v. Universal Amusements*, 445 U.S. 308

(1980), for the proposition that the license denial and revocation provisions of the Dallas sexually oriented business ordinance impose a prior restraint upon expressive material. Their reliance is misplaced in both instances. Unlike the Dallas case, those two cases considered the use of state nuisance statutes to enjoin the future publication or dissemination of expressive material.

In *Near*, a publication was enjoined and thus made unavailable because of what its publisher had said on previous occasions. Under the Dallas ordinance, no publication is made unavailable because of the enforcement of the ordinance, nor need the number of sexually oriented businesses in the city be reduced. Rather, the ordinance attempts to curb identifiable persons who may reasonably be expected, because of their conduct in recent years, to promote, permit, or participate in the criminal conduct that sexually oriented businesses have been shown to foster.

The offender in *Near* had addressed serious political issues, albeit in a virulently anti-Semitic way. In the Dallas case, there is no claim that any political or religious discourse would be in any way restrained by the Dallas ordinance. The attempt in *Near* was to prevent the publisher from repeating his conduct in publishing scandalous material. The Dallas ordinance does not prevent anyone from repeating the crimes for which he has been convicted. Rather, the ordinance attempts to remove from certain licensed businesses persons whose recent criminal history strongly suggests that they will be inclined or easily tempted to engage in the criminal conduct to which sexually oriented businesses are particularly susceptible.

The prohibition placed on the offending person in *Near* was perpetual; the disability under the Dallas ordinance can be cured in a few years if the person avoids certain criminal conduct. In *Near*, the publication was the target of the enforcement without regard to the criminal record of the publisher. In the Dallas ordinance, the target is the methods of operating sexually oriented businesses that encourage crime.

Unlike the situation in *Near*, the materials and activities of sexually oriented businesses will continue to be widely available in Dallas even if the ordinance is vigorously enforced. Indeed, even a person who is disqualified under the ordinance could continue to distribute such materials wholesale or by mail order. If the defendant in *Near* could not publish his newspaper, however, his political viewpoint would not have been available to any significant degree in the community. The suppression of a publication or viewpoint is neither the intended nor the likely consequence of the Dallas ordinance. The ordinance does nothing to make sexually explicit materials any less generally available than they would otherwise be.

Vance involved state statutes authorizing injunctions to issue against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute. These statutes resulted in the direct regulation of the content of motion pictures. This Court found that the statutes in *Vance* authorized prior restraints and were procedurally deficient. Like *Near*, *Vance* involved censorship of the future dissemination of expressive material, before the material was made available to the public.

The Dallas ordinance has no attributes of censorship. It does not call for the review of or prevent the publication or dissemination of any expressive material. It merely attempts to prevent, for a limited time, those persons convicted of certain crimes from engaging in a business that has a demonstrated relationship with those crimes. The ordinance is concerned only with the qualifications of those who may engage in a crime-sensitive business. It does not attempt to regulate the content of what is sold. Its purpose is not to suppress expressive material, but to reduce crime.[2] In neither *Near* nor *Vance* was there a criminal conviction prior to enforcement. In fact, the purpose of the statute in each of those cases was to avoid the state's onerous burdens under the criminal law. Under the Dallas ordinance, a person does not lose a sexually oriented business license until he is actually convicted of certain crimes.

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[2] The Dallas City Council clearly stated its purpose and intent in passing the ordinance:

> It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. (J.A. 8-9).

Judge Thornberry's statement in his concurring and dissenting opinion below, that the "denial of a license to engage in speech is . . . the classic prior restraint . . . " [*FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, 1307 (5th Cir. 1988)] is not appropriate to this case. The Dallas ordinance does not license people to engage in speech. It merely licenses people to operate sexually oriented businesses at particular locations. No license is required by this ordinance for any speech or publication, regardless of the sexually explicit content. An unlicensed person may write, create, publish, sell wholesale, sell through the mail, or give away sexually explicit material. In fact, an unlicensed person may operate a bookstore, so long as it does not have as one of its principal business purposes the sale of sexually explicit materials. Indeed, no license is required for most bookstores or video stores in the city.[3] The underlying basis of Judge Thornberry's dissent seems to be his view that a license denial has the effect of totally banning speech. This view is mistaken. Since the grant of a license does not authorize one to engage in

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[3] The assertion by the American Booksellers Association, et al., *amici curiae* brief in support of petitioners (Booksellers Br. 15-16) that virtually all bookstores or video stores will be subject to the ordinance is a mistaken interpretation of the requirements of the ordinance. Even petitioners do not make this claim. The ordinance definition of adult bookstore or adult video store is limited to commercial establishments which have as one of their *principal* business purposes the sale or rental of sexually explicit materials. See § 41A-2(2), J.A. 10. There are currently only 37 (Source: City of Dallas records) adult bookstores or adult video stores required to be licensed out of approximately 196 retail bookstores and 201 retail video stores in the city. Source: Greater Dallas Southwestern Bell Yellow Pages December 1988-89, pp. 344-48, 1860-61.

speech, its denial does not prevent one from engaging in speech. The concept of prior restraint is not relevant here. No speech is banned and no materials are censored.

Finally, the stringency of the rule against prior restraints rests in large part on the matter of who bears the burden of proof. There is a great difference between a publisher's having to persuade a censor that his yet-to-be-published manuscript is worthy of publication and a prosecutor's having to persuade a jury that an already published manuscript is so unworthy of publication as to be criminal.[4] That there is no shift in the burden-of-proof, and in fact, a burden of proof question is in no way raised by the enforcement of the Dallas ordinance, are further indications that there is no genuine prior restraint consideration involved.

2. The Dallas ordinance does not single out businesses engaged in expressive activities for regulation and closure.

Although it is proper to reasonably classify businesses involved in even expressive activity, the Dallas ordinance does not, as the adult cabaret petitioners argue, single out for regulation those businesses engaged in expressive activities. The ordinance regulates all sexually oriented businesses, including businesses that offer no expressive activities at all, such as escort agencies, sexual encounter centers, nude modeling studios, and certain

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[4] See George Anastaplo, *The Constitutionalist: Notes on the First Amendment* (Dallas: Southern Methodist University Press, 1971), p. 680 n. 18.

adult motels.[5] Neither do the disqualifications single out those engaged in expressive activities. Only three out of the thirteen disqualifying crimes involve any use of expressive materials and then only materials that are constitutionally unprotected.

Petitioners cite *Arcara v. Cloud Books, Inc.*, 478 U.S. 647 (1986), as support for their "singling out" theory. But there, this Court upheld the closing of a bookstore by the enforcement of a public health regulation of general application. The Court applied no First Amendment scrutiny in *Arcara* because the sexual activity for which the bookstore was closed manifested "absolutely no element of *protected* expression." *Id.* at 705 (emphasis added). Likewise, under the Dallas ordinance, a license denial or revocation predicated on convictions for specified crimes involves absolutely no element of protected expression. Only three of the crimes are at all related to expressive activities (obscenity; the sale, distribution, or display of material harmful to a minor; and possession of child pornography), and the requirement of conviction for these crimes removes any question about the presence of an element of protected expression. By their nature as crimes, these offenses represent activity associated only with unprotected expression. It is clear that the Dallas ordinance does not single out persons or businesses

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[5] The Court majority in *Renton* was not disturbed by the fact that the ordinance then under review singled out only adult motion picture theaters for regulation. This fact was noted by the dissent. *Renton*, 475 U.S. at 57 (Brennan, J. dissenting).

engaged in First Amendment protected activities either for general regulation or for license denial or revocation.

3. A city may properly rely on convictions for sexually related crimes that include an element of unprotected expressive activity, to temporarily disqualify a person from holding a sexually oriented business license.

It is not unusual for regulatory authorities to include various kinds of criminal conduct as a disqualification for persons to hold licenses in regulated businesses. In fact, the City of Dallas makes such provisions in many of its ordinances. See § 6A-7(2) in Amusement Center ordinance, J.A. 54; and § 14-11(b)(6) in Dance Hall ordinance, J.A. 68, for two examples.[6] These eligibility requirements are generally for the safety of the patrons as well as the surrounding communities.

The bookselling and video petitioners mischaracterize the purpose of the license disqualification provisions of the ordinance as being the prevention of future speech crimes. This conclusion is based on the fact that three of the thirteen crimes that serve as disqualifications are crimes that involve expression, that is, obscenity; the sale, distribution, or display of harmful material to a minor; and possession of child pornography. The purpose of the ordinance, however, is to minimize sexually related crimes that have been documented to proliferate in areas

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[6] The sections of these ordinances cited here are correct. Other portions of these ordinances as printed in the Joint Appendix do not include all current amendments.

surrounding sexually oriented businesses.[7] The city has selected as one method of accomplishing this purpose, the disqualification of offenders who, because of their sex-related crimes, should not be trusted with the operation of sexually oriented businesses because those businesses are highly susceptible to criminal abuse. It would be contrary to the stated purpose of the ordinance and certainly illogical for the city to issue a sexually oriented business license to a person who had recently been convicted of crimes the ordinance seeks to control. A conviction for promotion of prostitution would clearly justify the denial or revocation of a sexually oriented business license. cf. *Arcara*, 478 U.S. 697 (1986). It is erroneous to argue that the First Amendment provides a shield to a person whose sexually related crime happens to be obscenity.

The Court has recognized this general principle in approving the use of obscenity convictions as a predicate offense for prosecution under the Indiana RICO statute in *Fort Wayne Books v. Indiana*, 489 U.S. ___, 109 S.Ct. 916, 103

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[7] The City of Dallas considered studies conducted by the following cities, counties and organizations: Austin, Texas (DX 6); Indianapolis, Indiana (DX 7); Houston, Texas (DX 8); Beaumont, Texas (DX 9); Amarillo, Texas (DX 10); City of Los Angeles, California (DX 11); Phoenix, Arizona (DX 12); Las Vegas, Nevada (DX 13); Seattle, Washington (DX 14); Los Angeles County, California (summarized in DX 6); St. Paul, Minnesota (summarized in DX 6); and Vantex Enterprises, Inc., d/b/a Sheraton Mockingbird West (DX 21 and 22). The City of Dallas also conducted its own study (DX 19 and 20). These studies were consistent in their findings that higher crime rates and lower property values were directly related to sexually oriented businesses.

L.Ed.2d 34 (1989). Since conviction under a RICO statute can result in the forfeiture of all assets used and acquired in the course of "racketeering" activity, this holding could have more dire consequences for the suppression of expressive materials than the temporary disqualification imposed by the Dallas ordinance. If there is "no constitutional bar to the State's inclusion of substantive obscenity violations among the predicate offenses under its RICO statute" (*Id.* 103 L.Ed.2d at 50), there can be no constitutional bar to the inclusion of a substantive obscenity conviction among the predicate crimes that serve as a temporary disqualification from holding a license to operate a sexually oriented business.

Petitioners point to the concurring opinion in *Arcara* as support for their argument that obscenity is an improper predicate offense for license denial or revocation. The concurring opinion warns that if "a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns." The Dallas ordinance, however, is not a pretext for closing down sexually oriented businesses. Quite the contrary, the ordinance acknowledges the legal status of such businesses by providing them a license to operate. Even so, the city is not arguing that the ordinance does not raise First Amendment concerns, only that these concerns are addressed under the proper standard of review.[8] (See the discussion in Part II of this Brief.)

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[8] The Court in *Arcara* made one point that deserves attention. Respondents in *Arcara* argued that the effect of the sta-

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tory closure impermissibly burdened its First Amendment-protected book selling activities. The Court observed that "the severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same materials at another location." *Id.* at 705. Although the Dallas license denial and revocation provisions would temporarily disqualify a person from operating a sexually oriented business at any location within the city, this burden is not sufficient to warrant strict scrutiny because the regulation only indirectly affects speech, and the only speech that is indirectly affected is considered to be of a lesser value. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 and 70 (1976); *Renton*, 475 U.S. at 49 n. 2.

The Brief of amicus curiae, PHE, Inc., in support of petitioners, asserts that such literary works as *Ulysses* and *The Canterbury Tales* will be affected by the Dallas ordinance. PHE Br. 12. This assertion is erroneous since § 41A-21(e) of the ordinance (See J.A. 37) provides an exception under both the licensing and location requirements for material that contains serious literary, artistic, political, or scientific value. It is clear that what sexually oriented businesses serve is not a creative literary and political culture, as described in the amici curiae brief of American Booksellers Association (Booksellers Br. 4), but rather the right of entrepreneurs to profit from the base gratification of others. The customers of sexually oriented businesses are hardly interested in Joyce or Chaucer. They are seeking sexual satisfaction (see, for example, DX 33). As aptly stated in the dissenting and concurring opinion of Justice Stevens in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. ___, 103 L.Ed. at 65 (1989), "Many sexually explicit materials are little more than noxious appendages to a sprawling media industry." While the right to sell this material is a constitutionally protected right, sexually explicit material has been recognized as a form of expression in which there is "a less vital interest in uninhibited exhibition . . . than in the free dissemination of ideas of social and political significance. . . ." *American Mini Theatres*, 427 U.S. at 61; *Renton*, 475 U.S. at 49 n. 2.

4. The Dallas ordinance causes no ascertainable restriction on the public's access to constitutionally protected sexually oriented materials.

This Court has declined to hear petitioners' challenges to the location restrictions of the Dallas ordinance. Location restrictions would appear to have greater impact on the operation of sexually oriented businesses than licensing regulations, since many nonconforming businesses will have to move or change their operations at the end of the three-year amortization period. See § 41A-13(f), J.A. 27. Although a particular purveyor disqualified by a criminal conviction may be temporarily unable to sell sexually explicit materials or services at a sexually oriented business, the competition for locations will, without doubt, result in a new purveyor taking his place, as well as acquiring his stock-in-trade, and public access to sexually oriented materials and services will not be diminished.[9]

As discussed in the concurring opinion in *American Mini Theatres*, "the central First Amendment concern remains the need to maintain free access of the

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[9] In fact, Petitioner FW/PBS, Inc. argued in its brief to the Court of Appeals that between 106 and 114 currently operating sexually oriented businesses (not to mention new sexually oriented businesses entering the market) would be competing for no more than 50 locations under the Dallas ordinance. If Petitioner is to be believed, the competition for locations should be fierce. (See Opening Brief of Appellant FW/PBS, INC., et al., filed at the United States Court of Appeals for the Fifth Circuit No. 86-1723 pp. 43, 45-46, 51).

public to the expression." *American Mini Theatres*, 427 U.S. at 77. Because the owners of sexually oriented businesses convey primarily the messages of others [See Id. at 78 n. 2 (Powell, J. concurring)], it is of little consequence to the availability of the materials or services, which purveyor operates the commercial enterprise that sells them. It is important, however, to the suppression of crime. This regulation will have the effect not of suppressing protected expressive materials, but of assuring that the merchants who purvey such materials are persons who do not by their own acts contribute further to the deleterious secondary effects of sexually oriented businesses.

B. The procedural safeguards required in *Freedman v. Maryland*, 380 U.S. 51 (1965) are not applicable to the Dallas sexually oriented business ordinance.

The procedural safeguards prescribed in *Freedman v. Maryland*, 380 U.S. 51 (1965) were designed to deal with a licensing and censorship system which called for routine submission of all motion pictures to a censor before the films could be shown publicly. Upon a decision by the censorship board, a film could be found to be unprotected and thereby barred from exhibition until the exhibitor undertook a time-consuming appeal to the Maryland courts. *Id.* at 54. In *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), this Court found the *Freedman* safeguards applicable to an attempt to use the Texas public nuisance statute to enjoin the future exhibition of unnamed films that depicted particular acts enumerated in the state's obscenity statute. Similarly, in *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), this

Court invalidated a state court order enjoining petitioners from marching with swastikas and distributing materials which promote hatred against the Jewish faith, because the process used in imposing the injunction lacked the procedural safeguards of *Freedman*.

In each of these cases the government was seeking to suppress the content of undesired expression. The Court found that if "a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, . . . " *National Socialist Party*, 432 U.S. at 44. The policy behind requiring such strict safeguards is that it "is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. . . ." *Vance*, 445 U.S. at 316. The *Freedman* test is designed to place the burden in these circumstances on government to expedite the determination of whether expressive material, which the government wishes to suppress, is constitutionally protected. The license denial and revocation provisions of the Dallas ordinance contain none of the elements of censorship found in these cases.

1. The Dallas ordinance contains no censorship of expressive materials.

The obvious as well as announced purpose of the Dallas ordinance is to control the secondary effects of sexually oriented businesses on surrounding neighborhoods. These effects have been demonstrated to include the proliferation of crime, urban blight, and plummeting

property values. The license denial and revocation provisions of the ordinance contain no censorship features. Nothing in the licensing scheme regulates the content of any expressive materials purveyed on the premise of a sexually oriented business.

There are no subjective judgments to be made here by governmental officials administering the denial and revocation procedure. The chief of police is required to issue a license unless he finds one or more of ten objective statements to be true. See § 41A-5, J.A. 17-20. Objective criteria are provided throughout the ordinance as the basis for action by any city official that would adversely affect the holding of a license. None of the possible adverse actions is based on the content, or any determination concerning the content, of the expressive materials purveyed on the premises of a sexually oriented business.

For these reasons the Court of Appeals correctly found that "the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content." *FW/PBS, Inc. v. City of Dallas*, 837 F.2d at 1303. The Court of Appeals determined that the license denial and revocation provisions would, in fact, withstand strict scrutiny since the city established a "compelling justification for barring those prone to . . . [sexually related] crimes from the management of . . . [sexually oriented] businesses." *Id.* at 1305. It did not see fit to discuss the *Freedman* procedural safeguards because those safeguards do not apply to a regulation that does not at all attempt to restrict the contents of any expressive material, named or unnamed.

2. The licensing requirements of the Dallas ordinance are a valid means of ensuring enforcement of the location restrictions and are in furtherance of the city's purpose of reducing the deleterious effects of sexually oriented businesses on surrounding neighborhoods.

In *American Mini Theatres*, this Court upheld an ordinance containing licensing procedures which granted a broader discretion to administrative officials than does the Dallas ordinance.[10] In the present case, this Court declined to review the locational restrictions of the Dallas ordinance, thus leaving those regulations intact as affirmed by the Court of Appeals. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d at 1306. The licensing requirements of the ordinance are an integral and useful part of the enforcement of the locational restrictions.

A business must be in compliance with the locational restrictions to receive a license. By requiring each sexually oriented business to obtain a license, the city can pinpoint the location of each business for the purposes of measuring distances required by the restrictions. The city will have accurate records for determining compliance and for providing information to applicants about available locations. Further, without this regulatory system,

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[10] The Detroit ordinance gave the mayor power to refuse or revoke an adult theater license at any time upon proof of "the violation . . . , within the preceding two years, of any criminal statute . . . or [zoning] ordinance . . . which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." *American Mini Theatres*, 427 U.S. at 91 (Blackmun, J. dissenting).

prospective sexually oriented businesses would be left to guess where other sexually oriented businesses are located. The licensing also benefits a business by assuring that its location is so documented that other businesses cannot move within 1000 feet and claim prior rights.

All of the regulatory components of the Dallas ordinance are aimed at controlling crime, protecting neighborhoods, maintaining property values, and preventing the spread of urban blight. The district court correctly pointed out, as the petitioners conceded, that licensing is a valid method of ensuring that regulated businesses abide by locational and other restrictions. *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1071 n. 26 (N.D. Tex. 1986).

3. The license denial and revocation provisions of the Dallas ordinance contain ample procedural safeguards for a noncensorship regulation that only incidentally affects speech.

While the procedural safeguards prescribed in *Freedman* are not applicable to the Dallas ordinance, the ordinance contains other procedural safeguards sufficient to protect the rights of applicants and license holders. It provides reasonable time periods within which the city must respond to applications and appeals. See § 41A-5, J.A. 17; and § 2-96(b), J.A. 39. The decisions of administrative officials must be based on objective criteria. An appeal to the permit and license appeal board from a suspension or revocation stays the action of the chief of police. See § 41A-11, J.A. 25. An appeal from the permit and license appeal board may be made to the state district court where a temporary restraining order may be

obtained to stay an order of the board pending a hearing on a temporary injunction or mandamus.

These procedures are more than adequate to protect the rights of persons engaged in an ongoing commercial enterprise, especially since the ordinance does not seek to regulate the content of any expressive material. Any effect that the ordinance's regulations may have on expressive material is incidental to the principal purpose of the ordinance to prevent the recognized secondary effects that sexually oriented businesses have on surrounding neighborhoods. For this reason the District Court was correct in its conclusion that *Freedman* is not applicable and that the "appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards . . . ." *Dumas v. City of Dallas*, 648 F.Supp. at 1075.

II. THE DALLAS ORDINANCE, WHICH AFFECTS EXPRESSION ONLY INCIDENTALLY AND ONLY IN FURTHERANCE OF SUBSTANTIAL GOVERNMENTAL INTERESTS WHOLLY UNRELATED TO THE REGULATION OF EXPRESSION, IS VALID UNDER *RENTON V. PLAYTIME THEATRES, INC.*, 475 U.S. 41 (1986) AND *UNITED STATES V. O'BRIEN*, 391 U.S. 367 (1968).

Not only are the license denial and revocation provisions of the Dallas ordinance content-neutral regulations that only indirectly affect expressive activities, but the activities which they affect are "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . ." *American Mini Theatres*, 427 U.S. at 70, and

Renton, 475 U.S. at 49 n. 2.[11] For these reasons, the Dallas ordinance merits the intermediate level of scrutiny offered by both *Renton* and *United States v. O'Brien*, 391 U.S 367 (1968). While the *Renton* test has often been applied to time, place, and manner regulations, the *O'Brien* test has been used in situations that did not necessarily fit the time, place, and manner description. As this Court recently reiterated, however, the test under *O'Brien* "is little, if any, different from the standard applied to time, place, or manner restrictions." *Texas v. Johnson*, ___ U.S. ___, 57 U.S.L.W. 4770, 4772 (U.S. June 21, 1989); *Ward v. Rock Against Racism*, ___ U.S. ___, 57 U.S.L.W. 4879, 4884 (U.S. June 22, 1989).[12]

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[11] To allow for appropriate distinctions between near obscenity and other forms of speech will not diminish the vitality of the First Amendment. In his article "How to Read the Constitution of the United States," *Loyola University of Chicago Law Journal*, Fall 1985, George Anastaplo observes:

> After recognizing that political speech is at the heart of the "freedom of speech" clause, it is salutary to remind ourselves that our extensive freedom of political discussion did develop independent of the licentiousness to which we have recently become accustomed. Thus, neither principle nor history dictates that we must put up with licentiousness in order to have political freedom and effective self-government. Ibid., 54.

See also, G. Anastaplo, *The Constitution of 1787: A Commentary* (Johns Hopkins University Press, 1989) at 321 n. 98.

[12] This Court also explained in *Ward v. Rock Against Racism* that the "least restrictive" analysis sometimes attributed to *O'Brien* no longer applies to content-neutral regulations that only indirectly affect expressive activities.

The Court of Appeals in this case noted that the "*Renton* standard of review applies to the details of the licensing scheme . . . even though the licensing scheme may regulate aspects of the businesses' operations other than location." *FW/PBS v. City of Dallas*, 837 F.2d at 1304. It thus found the licensing requirements were designed "to control the negative effects of a certain kind of business rather than to suppress a certain type of speech" (*Id.* at 1302) and are, therefore, as valid as the location restrictions that these requirements serve. For this reason, the Court of Appeals held that the " 'time, place or manner' analysis cannot be limited solely to regulation of 'place.' " *Id.* at 1304.

Under *Renton*, "content-neutral" time, place, and manner regulations are constitutional if they are "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47. The only part of the licensing scheme the Court of Appeals in *FW/PBS* did not immediately recognize as a time, place and manner regulation were the provisions relating to license disqualifications for criminal convictions. The court reasoned, however, that

> The courts have not engaged in . . . strict scrutiny and have not otherwise required compelling necessity to justify other occupational bars attending a criminal conviction including those laced with activity protected by the first amendment such as labor organizing. In short, the city need only show that conviction and the evil to be regulated bear a substantial relationship.
>
> We agree with the district court that the Ordinance now is well tailored sufficiently to achieve its ends. *FW/PBS, Inc. v. City of Dallas*. 837 F.2d at 1305.

Because of the direct and substantial relationship between the offense and the evil to be regulated and because of the fact that the denial or revocation is temporary, the Court of Appeals determined that the disqualification provisions should not be analyzed under a standard different from that applicable to the ordinance as a whole.

Content neutrality

It is settled that an ordinance may be considered a "content-neutral" regulation for purposes of analysis under *Renton*, even though it classifies businesses based on content, if its measures are aimed not at the content but rather at the secondary effects of the business on the surrounding community. *Renton*, 475 U.S. at 47-48. A regulation is content-neutral if it is justified without reference to the content of the regulated speech, *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). The license denial and revocation provisions of the Dallas ordinance are content-neutral because they are aimed at the secondary effects of sexually oriented businesses and not at the content of what is sold on the premises of the businesses, and the provisions are justified without reference to the content of the materials. Even the dissenting opinion in the Court of Appeals recognized that the Dallas ordinance is content-neutral. *FW/PBS v. City of Dallas*, 837 F.2d at 1308 (Thornberry, J. concurring in part and dissenting in part).

Governmental interests served

The Dallas ordinance is designed to serve the same vital governmental interests that were at stake in both

Renton and *American Mini Theatres*. A city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. *American Mini Theatres*, 427 U.S. at 71; *Renton*, 475 U.S. at 50.

Alternative avenues of communication

The Dallas ordinance as a whole has been held to provide reasonable alternative avenues of communication for sexually oriented businesses. *Dumas v. City of Dallas*, 648 F.Supp. at 1069-71; *FW/PBS v. City of Dallas*, 837 F.2d at 1303. Individuals who are temporarily denied licenses also have limitless alternative avenues of communication. They may write, create, publish, sell wholesale, sell through the mail, or give away sexually explicit material. They may even operate a bookstore so long as it does not have as one of its principal business purposes, the sale of sexually explicit materials. The only limitation on individuals convicted of certain crimes is that temporarily they cannot operate a specific type of commercial establishment.

This Court should thus uphold the Dallas ordinance as a "content-neutral" time, place, and manner regulation designed to serve a substantial governmental interest which does not unreasonably limit alternative avenues of communication. If the Court determines, however, that the license denial and revocation provisions should be separated for analysis, the fact that they do not fit neatly into the time, place, and manner category should not deter the court from analyzing them under the same standard of review. In all respects, they meet the same criteria as the other provisions of the ordinance. This becomes very clear when the *O'Brien* test is applied.

The O'Brien test

Under *O'Brien*, a regulation is justified despite its apparent impact on First Amendment interests (1) "if it is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, at 377.

First, the City of Dallas, unquestionably, has the constitutional authority to enact licensing ordinances of this type. *American Mini Theatres*, 427 U.S. 50; see also, *Cox v. New Hampshire*, 312 U.S. 569 (1941). Second, as already noted, the license denial and revocation provisions of the Dallas ordinance clearly further important and substantial governmental interests of crime control. Third, the legislative history of the ordinance demonstrates that the governmental interest promoted by the ordinance is unrelated to the suppression of free expression. *Dumas v. City of Dallas*, 648 F.Supp. at 1069; see also, *Id.* at 1064-65 nn. 8-10, 1069 n. 21.

Finally, any incidental restriction that the ordinance may place on an individual's First Amendment freedom is no greater than is essential for the furtherance of the city's important and substantial governmental interest. *Dumas v. City of Dallas*, 648 F.Supp. at 1069. This fourth prong of *O'Brien* must be approached with awareness of the admonitions of *Renton* and *United States v. Albertini*, 472 U.S. 675 (1985). This Court in *Renton* observed that cities "must be allowed a reasonable opportunity to

experiment with solutions to admittedly serious problems" and was careful not to second-guess the wisdom of the particular method chosen. *Renton*, 475 U.S. at 52. In *Albertini*, the Court insisted that time, place, or manner regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech. *Albertini*, 472 U.S. at 689. While one might devise an alternative that is less restrictive than the license denial and revocation provisions of the Dallas ordinance, this court made its position on this subject very clear in *Ward v. Rock Against Racism*, ___U.S.___, 47 U.S.L.W. 4879 (U.S. June 20, 1989):

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-intrusive means of doing so. *Id.* at 4884.

The license disqualification provisions are narrowly tailored to apply only to businesses which have been documented as routinely causing adverse secondary effects and only to the crimes which are most prevalent in and around these types of businesses.[13] As the District Court pointed out:

> This principle was squarely addressed in *Arcara v. Cloud Books, Inc.*, ___U.S___, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986)(Burger, C.J.), in which the Court held that a sexually related business could be closed when management was aware of sexual behavior on

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[13] The District Court ruled that five enumerated crimes were not sufficiently related to the purpose of the ordinance. *Dumas v. City of Dallas*, 648 F.Supp. at 1074. The City Council subsequently amended the ordinance to remove those crimes.

> the premises, in violation of law. If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure. . . . One intent of the law was to prevent crime; the Ordinance considers only certain crimes to be relevant – such as prostitution, obscenity, or child pornography . . . . It allows even those convicted of such offenses to be licensed after a certain amount of time has elapsed. . . . It is thus narrowly tailored to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome. *Dumas v. City of Dallas*, at n. 34.

The licensing provisions of the Dallas ordinance satisfy the fourth element of the *O'Brien* test as elaborated by *Albertini*, in that they promote a substantial governmental interest that would be achieved less effectively in the absence of the regulation.

The *O'Brien* test was formulated and applied in a case upholding a regulation which indirectly affected highly protected political speech. Thus, the test's application to a regulation that indirectly affects expression of a much lesser value should require little debate. It is apparent that the license denial and revocation provisions of the Dallas ordinance are valid under the *O'Brien* test.

III. THE DALLAS ORDINANCE'S ADULT MOTEL REGULATIONS DO NOT VIOLATE THE FIRST, FOURTH, FIFTH, OR FOURTEENTH AMENDMENTS OR ANY CONSTITUTIONALLY PROTECTED FREEDOMS OF ASSOCIATION.

This Court accepted review of the adult motel regulations in the Dallas ordinance to determine whether those

regulations violate the First, Fourth, Fifth, or Fourteenth Amendments to the Constitution or any constitutionally protected freedom of association. Since the motel petitioners failed to argue a single Fifth or Fourteenth Amendment violation in their brief, those two issues must be settled in favor of the city. By petitioners' own admission, they have not challenged the Dallas ordinance on Fifth Amendment grounds. See Brief of Petitioners Calvin Berry, III, et al. at 4 (hereinafter Berry's Br.). The only issues which remain are the challenges under the First and Fourth Amendments and the challenge regarding associational freedoms.

The motel petitioners have asserted two issues not raised before. These include rights of commercial free speech (*Id.* at 14-15) and "the right to be let alone" (*Id.* at 13-14), neither of which have been previously argued in this case. Ordinarily, this Court does not decide questions not raised or resolved in the lower court except in exceptional circumstances. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *citing California v. Taylor*, 353 U.S. 553, 557 n. 2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958). There has been no attempt to show exceptional circumstances in this case; therefore, the Court should limit its review to issues that were considered below.[14]

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[14] In any case, petitioners do not explain the commercial free speech issue sufficiently to permit rebuttal. Their assertions regarding the "right to be let alone" seem to be similar to their privacy assertions. Indeed, their argument seems to be that they have a "right" not to be regulated in any way by the city.

The motel petitioners attack the Dallas City Council's findings as not specific enough (Berry's Br. 9-10); not supported by evidence (*Id.* at 12); and not " 'findings' at all, but purely speculative conclusions." *Id.* at 12. These attacks have no merit. The Court need only consider the studies and evidence contained in the record, (DX 1-2, 5-15, 17-18, 20 and 22); the unanimous findings of the City Plan Commission and the City Council (DX 16); the findings of the trial court (*Dumas v. City of Dallas*, 648 F.Supp. at 1076); and the conclusions of the Court of Appeals (*FW/PBS v. City of Dallas*, 837 F.2d at 1304-05), to realize that these attacks on the legislative findings have no basis.

Petitioners' First Amendment challenge is based on their assertion that the motel rooms they rent to the public have public access television transmissions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas." Berry's Br. 13. The ordinance definition creates three categories of activities that will bring a motel under the regulations for adult motels: (A) the offering and advertising, by way of a sign visible from the public right-of-way, of sexually explicit photographic reproductions available through television; (B) the offering of a sleeping room for rent for a period of time less than 10 hours; *or* (C) allowing the occupant of a sleeping room to subrent the room for a period of time less than 10 hours. See § 41A-2(4), J.A. 10.

By their own admission (Berry's Br. 4), petitioners' motels do *not* have a sign visible from the public right-of-way which advertises the availability of photographic

reproductions; therefore, they are not subject to the ordinance under Paragraph (A) of the definition and consequently are not being regulated on the basis of any First Amendment activity. In fact, there is nothing in the record of this case (other than the assertion in petitioners' brief) to verify that the motel rooms belonging to petitioners are equipped with television sets at all. The regulation of petitioners' adult motels is based solely upon the time period for which they rent rooms. Indeed, the Court of Appeals found, it "is certainly within reason that short rental periods facilitate prostitution . . . " (*FW/PBS v. City of Dallas*, 837 F.2d at 1304), and this type of criminal activity is what the ordinance seeks to suppress.

Having admitted that they are not regulated on the basis of any expressive activity, the petitioners' argument concerning lack of studies is irrelevant since extensive studies are not necessary to justify a business regulation that does not implicate the First Amendment. If, however, petitioners' motels had advertised in a way to subject themselves to the ordinance based on paragraph (A) of the definition, the city's substantial governmental interest in regulating adult motion picture theatres and adult arcades would have justified regulation of petitioners' adult motels. Both the theater and arcade uses have the same characteristics as motels that advertise sexually explicit videos or movies [See definitions in § 41A-2(1) and (5), J.A. 9-11]. The studies regarding those uses and adult motel uses (DX 6-14 and 19-22) substantiate the need for regulation.

One of Petitioners' Fourth Amendment challenges is based on their characterization of a motel room as a "temporary home." Berry's Br. 15. The assertion that a

stay in a motel room of less than 10 hours establishes a "temporary home" is without merit. Renting a motel room for two hours is more clearly associated with prostitution (*FW/PBS v. City of Dallas*, 837 F.2d at 1304), than with "the creation and sustenance of a family." *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984). This viewpoint is substantiated by the revealing statement in the motel petitioners' own brief that the "well-recognized 'quickie', the 'nooner', the 'one night stand' are traditional in America. . . ." Berry's Br. 19.

Petitioners mention the right to privacy many times in their brief. They do not explain, however, exactly how they believe anyone's right to privacy is being violated. To some extent their argument seems to be based upon their view of a motel room as a temporary home, but they also refer to the right to privacy of motel owners. Berry's Br. 14. In any case, no right to privacy issues are implicated in the Dallas ordinance.

Petitioners also attempt to find a Fourth Amendment issue by a cursory mention of the inspection section of the ordinance. Berry's Br. 19. The purpose, intent, and application of that section is to insure compliance with fire, safety, and other regulations, none of which apply to the activities of patrons who are renting rooms. The provision authorizes inspections when a business is occupied or open for business and was intended to limit the times at which businesses could be inspected. Furthermore, § 41A-7(c) specifically provides that the inspection provisions do not apply to rented motel rooms. In any case, under "the administrative search doctrine, searches to enforce regulatory standards may be reasonable in light of the reduced expectation of privacy in a pervasively

regulated business." *FW/PBS v. City of Dallas*, 837 F.2d at 1306, *citing United States v. Biswell*, 406 U.S. 311 (1972) and *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). The Court of Appeals held that "sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable." *FW/PBS v. City of Dallas*, 837 F.2d at 1306.

Finally, the Dallas ordinance does not violate motel owners' and operators' rights of intimate or expressive association. Motel owners and operators do not share with patrons a special community of thoughts, experiences, beliefs, nor the distinctively personal aspects of their lives. Motel patrons are numerous and motel owners are not highly selective in their decisions to rent rooms to them. See *Roberts*, 468 U.S. at 620. Renting rooms to the public is not an activity protected as an intimate association.

In a further attempt to establish an issue of expressive association, the motel petitioners again rely on their assertion that the motel rooms contain television sets. Putting a television in a motel room does not make the renting of that room an expressive act protected by the Constitution. Petitioners also assert that the associational activities of their patrons are protected by the First Amendment. That may be so, but nothing in the Dallas ordinance regulates the activities of the patrons of motels. It does not affect how long they may stay nor what they may do while they are there. No issue of expressive or intimate association is raised by this case.

The arguments of the motel petitioners do not substantiate any of their asserted constitutional claims. For

this reason, the Court must uphold the adult motel provisions of the ordinance as valid regulations to protect the public health, safety, morals, and general welfare. The regulations are clearly not arbitrary nor unreasonable, but are rationally related to the city's legitimate interest in curbing prostitution and other sex-related crimes. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Shelton v. City of College Station*, 780 F.2d 475, 479 (5th Cir. 1986)(en banc), *cert. denied*, 477 U.S. 905 (1986) and 479 U.S. 822 (1986).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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M.J.R., INC., et al.,

Petitioners,

vs.

CITY OF DALLAS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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No. 87-2051

In The

Supreme Court of the United States

October Term, 1988

M.J.R., INC., et al.,

Petitioners,

vs.

CITY OF DALLAS, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF OF PETITIONERS M.J.R., INC., et al.

ARGUMENT

I

THE DALLAS SEXUALLY-ORIENTED BUSINESS LICENSING ORDINANCE MAY NOT BE ANALYZED UNDER A DEFERENTIAL STANDARD OF REVIEW.

Apparently conceding that Dallas' sexually-oriented business licensing ordinance cannot withstand strict judicial scrutiny, respondents have relied almost exclusively upon their novel and unsupported assertion that this licensing law should be analyzed under a deferential standard of judicial

review.[1] They attempt to justify this standard by incorrectly characterizing this licensing ordinance as a time, place or manner restriction. Failing that, they assert deferential scrutiny should be applied simply because they believe petitioners' expression deserves less than full First Amendment protection. Neither contention has merit. Moreover, acceptance of respondents' position would require the overruling of this Court's many cases requiring strict scrutiny of content-neutral licensing laws affecting speech activities. More importantly, adoption of their position would so weaken the overall scope of First Amendment protection for speech and press as to permit any governmental entity claiming a content-neutral purpose to use license laws to restrain any type of speech deemed undesirable.

A. Respondents' Assertion That Dallas' Licensing Ordinance Is A Time, Place And Manner Restriction Is Patently Frivolous.

In their attempt to characterize this licensing ordinance as a time, place and manner regulation (thereby justifying deferential scrutiny), respondents have ignored the *sine qua non* of a time, place or manner regulation: it must not only be content-neutral and leave adequate alternative avenues for communication, **it must also in fact *be* a time, place and manner regulation!**

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[1] A "deferential" standard of review would permit the substantive features of this ordinance challenged as overbroad to be upheld essentially upon proof of a mere rational basis for their enactment. See *Ward v. Rock Against Racism*, ___ U.S. ___, 109 S.Ct. 2746, 2757-58 (1980). In contrast, a "strict" standard of review would require proof that a particular challenged provision was indispensable in order to further compelling and overriding municipal interests. This Court has uniformly employed this strict scrutiny for all laws which directly affect speech activities. In contrast, the "deferential" standard is employed in cases where laws only indirectly affect speech activities (see *United States v. O'Brien*, 391 U.S. 367 (1968)) or where content-neutral laws which leave open ample alternative avenues of communication regulate only the time, place or manner of expression.

In their opening brief, petitioners pointed out that this Court's decision in *Lovell v. Griffin*, 303 U.S. 444 (1938), established that licensing laws are, by definition, *not* time, place or manner regulations. This truism was also noted by Judge Thornberry in his dissenting opinion below. Although respondents have stressed the assertedly content-neutral purposes underlying this licensing ordinance, it nonetheless prohibits "adult" businesses from operating at *any* time, at *any* location within the City, and in *any* manner absent the prior obtaining of a license.

Moreover, this licensing ordinance may not be treated as a time, place or manner regulation because there is no alternative avenue of communication available to one who has been denied a license. For example, in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), this Court held that the challenged adult zoning ordinances provided ample alternative locations. Thus, those ordinances qualified for the deferential scrutiny applicable to time, place and manner restrictions.[2] Here, an individual denied a license cannot operate an adult cabaret or adult bookstore at any other alternative location within the City. The denial of a license is a complete ban upon that individual's First Amendment right to engage in lawful expression. As such, the deferential scrutiny which is applicable to time, place and manner regulations or available under the *O'Brien* test, is completely impermissible here.

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[2] In *Young*, the Court, per the concurring opinion of Justice Powell, described the appropriate test as that of *United States v. O'Brien*, 391 U.S. 367 (1968). In *Renton*, a majority of this Court held that the appropriate test was that for a time, place and manner restriction. This Court's recent opinion in *Ward v. Rock Against Racism*, ___ U.S. ___, 109 S.Ct. 2746, 2757 (1989), made clear that the standards of review under *O'Brien* and time, place and manner analysis are essentially identical.

B. Adoption Of Less Than Strict Scrutiny For Content-Neutral Licensing Laws Applying To Speech Activities Would Overrule Many Decades Of This Court's Cases And Would Gut The Protections Of The First Amendment As Intended By The Framers.

Even if not a time, place or manner regulation, respondents appear to contend that Dallas' sexually-oriented business licensing ordinance was adopted for content-neutral purposes and therefore should be analyzed under deferential scrutiny and should also be exempt from compliance with the substantive and procedural safeguards applicable to all First Amendment licensing laws under the *Lovell v. City of Griffin*, 303 U.S. 444 (1938), and *Freedman v. Maryland*, 380 U.S. 51 (1965), lines of cases. Even assuming, *arguendo*, that the ordinance was enacted for legitimate content-neutral purposes, this Court's decisions hold that strict judicial scrutiny and heightened safeguards are still required.

In *City of Lakewood v. Plain Dealer Publishing Co.*, ___ U.S. ___, 108 S.Ct. 2138 (1988), the City had enacted a content-neutral license requirement for all persons maintaining newsracks on public sidewalks. Although some disputed whether there was a First Amendment right to *have* a newsrack on a public sidewalk, every Justice agreed with the majority's holding that the strict scrutiny of "the *Lovell-Freedman* line of cases would be applicable . . . if the City . . . required licenses for all stores which sold newspapers." [Dissenting opinion of Justice White joined in by Justices Stevens and O'Connor, ___ U.S. at ___, 108 S.Ct. at 2155.] That is the situation here. Dallas has required an annual business license for all adult cabarets and bookstores. Obviously, since the substantive and procedural safeguards of the *Lovell* and *Freedman* lines of cases apply to the content-neutral annual business license requirement in *Plain Dealer*, they must also apply here. If the respondents' position were adopted herein, permit requirements such as that involved in *Plain Dealer* would no longer be subject to the *Lovell* or *Freedman* lines of cases because of their content-neutral purpose. Yet all the harms identified by this Court in *Plain*

Dealer would continue to exist in the permit requirement, notwithstanding its content-neutral purpose.

Similarly, the parade permit stricken in *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), was surely content-neutral (i.e., it did not single out particular types of parades based on content), but it was still subjected to strict scrutiny in order to prevent the potential for censorship which is always inherent in even a content-neutral licensing requirement.

The same can also be said for this Court's decisions in *Schneider v. State*, 308 U.S. 147 (1939) (striking a content-neutral permit requirement for distribution of *any* types of handbills on public streets or sidewalks notwithstanding legitimate purpose of litter prevention); *Largent v. Texas*, 318 U.S. 418 (1943) (striking a content-neutral permit requirement for sale of *all* books or tracts in the City); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking a content-neutral license tax for all persons selling *any* items door-to-door – law found deficient as applied to those engaged in First Amendment activity); *Saia v. New York*, 334 U.S. 558 (1948) (striking content-neutral permit requirement for public use of sound amplification devices notwithstanding legitimate content-neutral purpose); and *Riley v. National Federation of the Blind of North Carolina, Inc.*, ___ U.S. ___, 108 S.Ct. 2667, 2680 (1988) (striking content-neutral permit requirement for professional fund raisers due to lack of adequate procedural safeguards under *Freedman*). In each of these cases, laws were stricken under strict judicial scrutiny even though they applied to all persons, regardless of the content of their message and even though many of them were enacted for legitimate reasons unrelated to the content of the expression regulated. Thus, the mere fact that the Dallas ordinance may have been enacted for legitimate purposes unrelated to the suppression of expression would not, even if true, allow it to avoid compliance with the strict substantive and procedural safeguards of the *Lovell-Freedman* lines of cases, nor, since this is a licensing law (and hence, a prior restraint by definition) would a content-neutral purpose allow the ordinance to escape the strict judicial scrutiny and the presumption of

invalidity applicable to all prior restraints. *See*, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 and 558-559 (1975).[3]

In sum, respondents would have this Court abandon the strict judicial scrutiny of the *Lovell-Freedman* lines of cases on the mere assertion of a legitimate content-neutral purpose in support of a speech-related licensing requirement. It should be clear from the cases cited above that adoption of respondents' position would require the overruling of almost the entire body of First Amendment licensing jurisprudence and would gut the First Amendment of the protections which have traditionally safeguarded minority or controversial expression.

C. The Fact That Petitioners Are Engaged In Constitutionally Protected Expression Which Is Sexually-Oriented Does Not Warrant A Lesser Standard Of Judicial Scrutiny.

As a third way of attempting to obtain a deferential standard of judicial review, respondents have baldly asserted that the sexually-oriented nature of petitioners' constitutionally protected expression gives the City *carte blanche* to establish a licensing law immune from traditional strict First Amendment scrutiny. This assertion not only conflicts with existing Supreme Court case law (none of which respondents discussed), but is also a radical and dangerous departure from fundamental First Amendment principles that have guaranteed a forum for the evolution of unpopular or minority opinions throughout tnis Country's history.

First, *Freedman* itself applied strict, rather than deferential, scrutiny to a licensing law affecting individuals similarly situated to petitioners herein. There, strict procedural safeguards were required to protect sexually-oriented expression which stayed on the protected side of that dim and uncertain

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[3] See also, *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, at 592 (1983) ("[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment").

line separating protected expression from obscenity. Unless this Court overrules *Freedman* and its progeny,[4] it cannot adopt a deferential standard of scrutiny for licensing laws affecting sexually-oriented expression.

Second, even in the non-licensing context, this Court has consistently rejected the suggestion that certain types of non-obscene sexually-oriented expression are entitled to less than full First Amendment protection. For example, in *Young v. American Mini Theaters, supra*, Justice Stevens, joined by three other members of the Court, was of the opinion that, at least in the context of a *zoning* regulation (as distinct from a *licensing* law as involved here), less than full First Amendment scrutiny could be applied where the expression at issue was sexually-oriented but non-obscene. However, a majority of the Court refused to accept that position even in the context of the time, place or manner restriction there at issue.[5] Similarly, in *F.C.C. v. Pacifica Foundation, Inc.*, 438 U.S. 726 (1978), another case involving a time, place or manner restriction, this Court again refused to embrace the notion, suggested by a plurality, that a lesser standard of constitutional protection should apply to non-obscene "indecent" speech.[6]

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[4] Similarly, this Court would also have to overrule, *inter alia*, *Teitel Film Corporation v. Cusack*, 390 U.S. 139 (1968); *United States v. 37 Photographs*, 402 U.S. 363 (1971); *Blount v. Rizzi*, 400 U.S. 410 (1971); and *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975), all of which applied a standard of strict judicial scrutiny requiring *Freedman's* procedural safeguards in various laws aimed at the separation of obscenity from sexually-oriented expression which is constitutionally protected.

[5] See the dissenting opinion of Justice Stewart (speaking for four members of the Court), 427 U.S. at 84 and the concurring opinion of Justice Powell, 427 U.S. at 73, n. 1.

[6] See the concurring opinion of Justice Powell (joined by Justice Blackmun) at 438 U.S. at 761 (stating: "I do not join [the plurality] because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected

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Most recently, in *Sable Communications v. F.C.C.*, ___ U.S. ___, 109 S.Ct. 2829 (1989), this Court unanimously struck down an FCC regulation which banned non-obscene "indecent" telephone messages. It did not even suggest that "indecent" speech was entitled to anything less than full First Amendment protection.

Finally, for *policy* reasons, this Court must reject the dangerous notion that the degree of protection of speech should fluctuate with the value which five members of this Court perceive that speech to have.[7] We know that what is perceived as "valuable" can fluctuate greatly over time. As eloquently stated by Justice Holmes, dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919):

> "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of

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by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection") and the dissenting opinion of Justice Brennan (joined by Justice Marshall) at 438 U.S. at 762-763 (describing as "completely antithetical to basic First Amendment values [the notion] that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court"). Justice Stewart, the fifth Member of the Court rejecting the plurality opinion, found it unnecessary to address the point as he thought the statute could be saved by construction. However, Justice Stewart had expressed his views in his dissenting opinion in *Young*, *supra*.

[7] As pointed out by Judge Kozinski in *United States v. United States District Court*, 858 F.2d 534, 541 (9th Cir. 1988), "the first amendment is as close to an absolute as we have in our jurisprudence: Speech shielded by the amendment's protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message . . . cannot, of course, detain us from discharging our duty as guardians of the Constitution." He then cited as examples the Ku Klux Klan's cross-burning upheld in *Brandenburg v. Ohio*, 395 U.S. 444, 448-449 (1969) and the right of Neo-Nazis to march through Jewish neighborhoods in a peaceful fashion upheld in *Collin v. Smith*, 578 F.2d 1197, 1203 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

> their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."

While some may well believe that sexually-oriented expression has comparatively less "value" than certain other forms of expression, the rental of many tens of millions of sexually-oriented videotapes every year in this country suggests that one citizen's idea of "value" may be quite different from another's. Moreover, if this Court were to permit diminished First Amendment protection depending upon the content of expression, it would begin a descent into a constitutional abyss from which it could not return. Not only would there be no principled way to distinguish speech based upon its perceived value[8], there would be no principled way to define the fluctuating extent of protections available to these various categories of protected expression.

Perhaps most importantly, as *Freedman* recognized, the licensing of sexually-oriented expression is an area where there is an enormous potential for administrative abuse of otherwise valid licensing laws. But for *Freedman*'s procedural safeguards, a hostile licensing official could delay acting on a permit application until the applicant could no longer afford to continue attempting to open a bookstore or cabaret. A

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[8] For example, in the present case, respondents request a diminished level of protection for laws regulating businesses engaged in sexually-oriented expression. In *F.C.C. v. Pacifica*, *supra*, and in *Sable*, *supra*, a similar *but by no means identical* classification was chosen, i.e., non-obscene "indecent" expression. Not only are the contours of "indecency" impossible to accurately define, there is no reason to presume that the contours of that category would be co-extensive with the contours of the type of sexually-oriented expression subject to regulation in *Young* and in the present case, i.e., all "sexually-oriented" expression.

Moreover, this list need not be exhaustive. Once this Court allows itself to make distinctions based upon perceived value, there is no limit to the number of categories and sub-categories that could be created. For example, while many would share the opinion that Nazi [or Ku Klux Klan, or Devil worship, etc.] propaganda has little, if any, value, no one has yet asserted that it is not entitled to full First Amendment protection.

judicial petition for administrative mandamus would not provide a meaningful remedy. First, the expense of such a proceeding would deter all but the best financed and most determined as the store would be required to remain closed (thus not producing income) while the litigation continued. Moreover, in many if not most states, the relief available in administrative mandamus does not include an order compelling issuance of a permit. Rather, if a court agrees with a petitioner, it merely remands the matter back to the agency which can then see whether there may be any *other* bases available for denying the permit. A hostile administration could continue this game until even the most determined and best financed applicant would be forced to give up. It is only *Freedman*'s requirement for express procedural safeguards on the *face* of a licensing ordinance which prevents this scenario from taking place.[9]

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[9] This Court needs no further proof that the removal of strict procedural safeguards would result in the total suppression of the First Amendment rights of persons engaging in constitutionally protected expression which is sexually-oriented. As recently as last term, enforcement officials in Fort Wayne, Indiana had padlocked three adult bookstores and seized all of their inventory, all on a mere *ex parte* presentation to a judge. *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. 916 (1989). But, for this Court's constant requirement of rigid adherence to strict procedural safeguards, those same officials and officials just like them around the country could and would immediately achieve the suppression of sexually-oriented constitutionally protected expression through the unprincipled use of the type of content-neutral licensing laws advocated by the City of Dallas herein.

Other historical examples abound to illustrate the point that sexually-oriented expression would disappear almost overnight if not for this Court's rigid adherence to strict substantive and procedural safeguards when dealing with such expression. See, e.g., *Marcus v. Search Warrants*, 367 U.S. 717 (1961) (illegal mass seizure of 11,000 copies of 280 publications from adult bookstore based solely on officer's personal opinion that they were obscene); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964) (illegal mass seizure of 1,715 books from adult bookstore without any prior adversary hearing); *Lee Art Theatre*,

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In sum, where, as here, the *licensing* of First Amendment businesses is at issue, there is simply no "diminished" standard of judicial scrutiny that will provide any meaningful protection of First Amendment rights.

II

RESPONDENTS HAVE FAILED TO JUSTIFY THE ORDINANCE'S LACK OF PROCEDURAL SAFEGUARDS AS REQUIRED BY *FREEDMAN V. MARYLAND, SUPRA.*

The *Freedman* issues in this case are essentially twofold: (1) Do the *Freedman* standards apply; and (2) does the Dallas ordinance contain them? As will be shown below, respondents' attempts to distinguish *Freedman* are meritless and they have virtually conceded that the ordinance cannot pass muster under a *Freedman* analysis.

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Inc. v. Virginia, 392 U.S. 636 (1968) (illegal seizure of motion picture films from motion picture theater based solely on conclusory affidavit by officer in ex parte proceeding); *Roaden v. Kentucky*, 413 U.S. 496 (1973) (illegal warrantless seizure of film from motion picture theater); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (illegal search and seizure of adult bookstore by judicial officer who was not "neutral and detached").

Similarly, in the licensing area, but for this Court's intervention, abuses would be commonplace. See, e.g., *Teitel Film Corp. v. Cusak*, *supra*, 390 U.S. 139 (1968) (but for this Court's intervention, City of Chicago would have been allowed 57 days for censor to deny film exhibition license and there would have been no provision for prompt judicial decision); *Blount v. Rizzi*, *supra*, 400 U.S. 410 (1971) (but for this Court's intervention, postal service could have unilaterally concluded that certain mail was "obscene" and therefore "non-mailable" and would not have had to obtain judicial approval of such a decision); *Southeastern Promotions, Ltd. v. Conrad*, *supra*, 420 U.S. 564 (1975) (City would have succeeded in preventing performance of the rock musical "Hair" pursuant to a scheme devoid of procedural safeguards, but for this Court's intervention); and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (sexually-oriented expression would have been banned by informal intimidation but for this Court's intervention).

A. Respondents' Attempted Distinctions Of *Freedman* Have Absolutely No Merit.

Respondents first assert that *Freedman*'s procedural safeguards are only required where the government is "seeking to suppress the *content* of undesired expression" (respondents' brief at 23), citing *Freedman*, *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980), and *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977). Tellingly, they neither cite nor attempt to distinguish this Court's opinion in *Riley v. National Federation of the Blind of North Carolina*, *supra*, ___ U.S. ___, 108 S.Ct. 2667 (1988), which, as repeatedly pointed out by petitioners in their opening brief, imposed *Freedman*'s procedural safeguards upon a content-neutral licensing requirement for all professional fund raisers.

Not only is *Riley* dispositive of respondents' attempted "content-neutral" distinction of *Freedman*, but it is also consistent with this Court's general approach to licensing laws affecting speech. Specifically, *Freedman* pointed out that the special dangers of laws requiring a license to engage in speech require not only the imposition of *substantive* safeguards (to prohibit any discretionary grounds for denying a license), but also require imposition of *procedural* safeguards (to protect against censorship by delay or unduly burdensome procedural requirements for obtaining a license). In the *substantive* safeguards cases, this Court has never distinguished between permit laws which are based on content and those which apply to all speech regardless of content. For example, the permit requirements stricken in *Hague v. C.I.O.*, 307 U.S. 496 (1939), and *Kunz v. New York*, 340 U.S. 290 (1951), applied only to persons engaged in speech of a particular type of content. In *Hague*, a permit was needed to lease a hall for a public meeting *involving advocacy of obstruction of the government*. In *Kunz*, a permit was needed to hold meetings on streets only *if they were of a religious or public worship nature*.

However, the *absence* of content-based classifications did not prevent this Court from requiring the same substantive safeguards for the content-neutral permit requirements stricken in, e.g., *Schneider v. State*, *supra*, 308 U.S. 147

(1939) (permit needed to distribute *any* handbills on public streets or sidewalks regardless of content); *Saia v. New York*, 334 U.S. 558 (1948) (permit needed to use any sound amplification devices in public regardless of content of message) and *City of Lakewood v. Plain Dealer, supra*. The point here is that the substantive and procedural safeguards which this Court has required of licensing laws affecting speech are necessary *regardless* of whether the law is content-based or content-neutral. Any other conclusion would allow the rampant suppression of expression whether sexually-oriented, religious, political or otherwise.[10] Clearly, *Riley*'s extension of *Freedman*'s procedural safeguards into the content-neutral area is inescapably required by this Court's prior decisions. Moreover, respondents have not even asserted that this Court should overrule its decision in *Riley* nor, for the reasons mentioned above, would such a decision be wise.

B. Respondents Virtually Concede That The Procedural Safeguards Required by *Freedman* Are Not Present In This Licensing Scheme.

While respondents assert (at pp. 26-27) that this licensing scheme contains "ample" procedural safeguards for a licensing law subject to deferential judicial scrutiny, they do not even suggest that it contains the procedural safeguards required by *Freedman*. Petitioners pointed out that the ordinance does not limit the time for initial denial of a permit application (BOP[11] 18-19). The City's only response is that "it provides reasonable time periods within which the City must respond to applications and appeals." The City neither

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[10] Moreover, as illustrated by *Murdock v. Pennsylvania, supra*, 319 U.S. 105 (1943), even laws which require permits of primarily non-expressive activity must comply with the substantive and procedural safeguards of *Lovell* and *Freedman* when applied to those engaged in protected expression. See discussion of this point in *People v. Fogelson*, 21 Cal.3d 158, 164, n.6, 145 Cal.Rptr. 542, 545, n.6, 577 P.2d 677 (1978).

[11] Brief of petitioners M.J.R., Inc., et al.

asserts any error in the petitioners' assessment of the ordinance's meaning nor do they purport to offer any authoritative saving construction.

Similarly, petitioners pointed out that an applicant must refrain from speech while an appeal to the Permit and License Appeal Board is pending and that there is no time limit for a final decision by that Appeal Board. Respondents did not dispute that statement.

Similarly, petitioners pointed out that it is the denied applicant, and not the City, that has the burden to pursue any appeal taken from a license denial. Respondents do not dispute this.

Finally, although respondents point out that an appeal from the Permit and License Appeal Board can be taken to the State District Court "where a temporary restraining order may be obtained . . . pending a hearing on a temporary injunction," they do not contend that the ordinance guarantees issuance of such a stay and, more importantly, they do not dispute that the ordinance fails to limit the overall amount of time between filing of an application and the ultimate availability of judicial review.

In sum, respondents have conceded that this ordinance does not come close to meeting the necessary procedural requirements of *Freedman v. Maryland*.

III

RESPONDENTS' ATTEMPTS TO DISTINGUISH *NEAR V. MINNESOTA*, 283 U.S. 697 (1931), ARE EQUALLY WITHOUT MERIT.

In petitioners' opening brief, they pointed out that the provisions of the ordinance authorizing license denial or revocation for prior speech-related offenses are clearly prohibited by this Court's holding in *Near v. Minnesota*, *supra*, that government cannot prohibit future speech due to past speech violations. Respondents have attempted to distinguish *Near* on a variety of grounds, none of which have any merit.

They characterize denials and revocations as "temporary" even though a prior speech violation bars licensure for from 2

to 5 years, depending upon the seriousness of the violation. They assert that no speech will be restrained by the denial of a license because there will be others eager to take the place of the denied applicant. Their boldly stated basis for this conclusion is the zoning law's amortization requirement, which will close 106 currently operating businesses and force them to compete for 50 available sites. See respondents' brief at 21, n. 9. None of these arguments distinguishes *Near*.

As stated in *Southeastern Promotions, Ltd. v. Conrad*, *supra*, 420 U.S. at 555, n. 8: "A licensing system need not effect total suppression in order to create a prior restraint." As also pointed out in Justice Brennan's plurality opinion in *Elrod v. Burns*, 427 U.S. 347, at 374 (1976), "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Moreover, from the denied applicant's perspective, the restraint under Dallas' ordinance is as bad, if not worse, than that in *Near*. The applicant with a prior speech violation is barred for several years *anywhere* in Dallas. In contrast, Mr. Near was at least free to start a new newspaper under a different name so long as he steered clear of scandalous publications.

Respondents further support their licensing scheme as one that will "curb identifiable persons who may reasonably be expected, because of their conduct in recent years, to promote . . . the criminal conduct that sexually-oriented businesses have been shown to foster." (P. 11) However, at least to the extent that license denial is based upon prior speech violations, this statement concedes that the purpose is to prevent the possibility of future speech violations by those who have committed speech violations in the past. This is precisely what *Near* prohibited.[12]

Respondents further assert that the Dallas ordinance has "no attributes of censorship" because its "purpose is not to

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[12] As this Court characterized its holding in *Near*, in *Kingsley Books v. Brown*, 354 U.S. 436, 445 (1957), "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. . . .[T]his is of the essence of censorship."

suppress expressive material, but to reduce crime." (P. 13) However, as this Court recently noted in *Fort Wayne Books v. Indiana, supra*, ___ U.S. ___, 109 S.Ct. 916, 929 (1989), "*Near* . . . recognized that the way in which a restraint on speech is 'characterized' under State law is of little consequence." Although this Court, in *Fort Wayne Books*, agreed that the asserted purpose of Indiana's RICO law was not "pretextual," it nonetheless concluded that the seizure provisions violated First Amendment guarantees. Similarly, the asserted content-neutral purpose of Dallas' ordinance does not shield its effect from a *Near* analysis.

For all the reasons above, the provisions of the Dallas ordinance mandating denial or revocation of a license for prior speech violations are indistinguishable from the prior restraint in *Near*. Petitioners urge this Court to strike this prior restraint as clearly and decisively as it did in *Near*.

IV

RESPONDENTS HAVE FAILED TO JUSTIFY THE NON-SPEECH LICENSING DISQUALIFICATION CRITERIA.

In essence, respondents rely on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), to sustain license denial or revocation based upon prior convictions for non-speech offenses. However, such reliance is misplaced.

First, the public nuisance injunction at issue in *Arcara* was upheld under a *deferential* standard of review. The majority pointed out, however, that strict scrutiny would be required if a law "has the inevitable effect of singling out those engaged in expressive activity." 478 U.S. at 707. Respondents assert that this licensing scheme does not "single out" those engaged in First Amendment activity because 10 of the 13 disqualifying crimes are not speech-related offenses. However, that argument misses the point. The *Arcara* statute applied to persons engaged in *any* type of business, whether expressive or not. Here, the adult cabaret license and adult bookstore license requirements apply only to persons engaged in expressive activity. As pointed out in *Minneapolis Star v.*

Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), whenever any law singles out persons engaged in expressive activity, there is always the danger that such a law will be applied other than even-handedly. For that reason, strict scrutiny is required of such laws to ensure that they cannot be manipulated to the detriment of persons engaged in speech-related businesses.

Second, even apart from the "singling out factor," this case – unlike *Arcara* – involves a *licensing* law. As early as *Lovell v. City of Griffin*, *supra*, this Court noted that laws requiring a license to engage in speech are *inherently* suspect and were one of the primary factors motivating enactment of the First Amendment. It would violate the Framers' intent to apply deferential scrutiny to any aspect of a law requiring a license to engage in expression. *See*, e.g., discussion in *Thornhill v. Alabama*, 310 U.S. 88, at 97-98 (1940).

Third, in *Arcara*, closure was not simply automatic upon proof of a single incident of unlawful activity. A judge had traditional equitable discretion to abate the premises only if such drastic relief was deemed warranted. By contrast, under the Dallas ordinance, proof of a *single* isolated unlawful[13] act at a location *compels* the non-renewal or revocation of the license, even though such punishment may be grossly disproportionate. Moreover, the determination that a violation has occurred is made *administratively*, not *judicially*.

Fourth, the restraint in *Arcara* was far less sweeping. Cloud Books was free to re-establish its business at any other location. In contrast, Dallas' ordinance blanketly prohibits one with a prior conviction from engaging in these First Amendment activities *anywhere* in the City.

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[13] Under Dallas' ordinance, the bases for revocation are not limited to proof of prior criminal *convinctions*. They also include *administrative* determinations of non-compliance with mere *regulatory* provisions! *See*, e.g., Dallas City Code § 41A-10(b) (1)-(4) and (6)-(8).

In sum, the deferential scrutiny applicable to the law of general application upheld in *Arcara* is manifestly inappropriate for reviewing the restraint of speech imposed by this *administrative licensing* scheme.

V

THE REMAINING CHALLENGES TO THIS LICENSING SCHEME PRESENTED IN PETITIONER'S OPENING BRIEF ARE PROPERLY BEFORE THIS COURT.

In Point IV of their opening brief, petitioners pointed out that the Dallas licensing scheme is so riddled with unconstitutional features that it must be stricken in its entirety. In addition to those features already discussed, this also included multiple provisions giving the Chief of Police substantive discretion for the denial of a license (P.O.B., p. 42), the inspection provisions authorizing *five* different agencies to conduct *warrantless* inspections and mandating a license denial for non-compliance with those requirements (P.O.B. p. 45), the provisions which prevent re-application for 90 days after a revocation order or a ruling denying renewal, even after all the bases for the prior revocation or non-renewal have been corrected (P.O.B., p. 44), and the provision disqualifying not only those who have had prior criminal convictions but also those who merely *reside* with persons who have had prior criminal convictions or prior license denials (P.O.B., p. 44). Respondents claim that these issues are not within the scope of this Court's order granting certiorari and therefore should not be addressed. In contrast, some of their amici considered those issues to be properly presented and have requested a favorable ruling thereon.

Petitioners respectfully submit that this Court's order granting review is sufficiently broad to permit consideration of these issues. The provision prohibiting issuance of a license to one who resides with one who has suffered a conviction is clearly subsumed within Question Presented No.

1 in the certiorari petition of petitioners herein.[14] Similarly, the validity of the provision prohibiting re-application within 90 days after all prior problems have been solved is certainly pertinent to the *Freedman* point which was expressly raised in the questions presented in the separate certiorari petitions filed by petitioners M.J.R. and FW/PBS. It is respectfully submitted that the balance of these issues are subsumed within the second question presented for review in the certiorari petition of FW/PBS (which, of course, was consolidated with the petition in *M.J.R., Inc. v. City of Dallas*).

Petitioners believe that the ordinance's *Freedman* deficiencies will require the complete invalidation of the licensing requirement of § 41A-4(a). If they are incorrect, then there are so many other constitutional problems with this ordinance that its overbreath is substantial judged in relation to its plainly legitimate sweep and it must be stricken in its entirety. *See, Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, n.12 (1985).

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[14] That Question Presented expressly placed before the Court the issue of whether *spousal* convictions were constitutionally permissible as grounds for a license denial or revocation.

CONCLUSION

For all of the reasons above, the judgment of the Court of Appeals for the Fifth Circuit should be reversed and that Court should be directed to order the District Court to enjoin enforcement of the ordinance. Failing that, the judgment of the Court of Appeals should be vacated and that Court should be instructed to reassess this ordinance under a standard of strict judicial scrutiny.

DATED: August 18, 1989

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OCT 20 1989

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No. 87-2051

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

—o—

M.J.R., INC., et al.,

Petitioners,

vs.

CITY OF DALLAS, et al.,

Respondents.

—o—

On Writ Of Certiorari To The
United States Court of Appeals
For The Fifth Circuit

—o—

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF PETITIONERS M.J.R., INC., et al.

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rule 35.5 of this Court, petitioners seek leave to file the attached Supplemental Brief following the argument of this case on October 4, 1989.

Petitioners submit this Supplemental Brief solely in order to provide a more complete answer to an unexpected question from the Court near the end of counsel's allotted time for argument. Specifically, Justices Kennedy, Scalia and O'Connor asked counsel whether the

Constitution would permit a legislature to authorize disqualification of a bookstore or other speech-related business for a license as part of a sentence for a criminal offense.

Petitioners' counsel wishes to supplement his response to that question, as the answer originally given was incomplete, and thus misleading as to petitioners' actual position, due to the expiration of counsel's time. Because this issue is critically important to the doctrine of prior restraint, counsel respectfully urges the Court to allow the filing of this supplemental brief, which will provide a more developed response to the Court's inquiry and should correct any misimpression of petitioners' position which might have been conveyed.

October 19, 1989

Respectfully submitted,

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Constitution would permit a legislature to authorize disqualification of a bookstore or other speech-related business for a license as part of a sentence for a criminal offense.

Petitioners' counsel also failed to supplement his response to that question, as the Court originally gave him incomplete, and thus misleading as to petitioners' actual position, due to the expiration of counsel's time. Because this issue is critically important to the doctrine of prior restraint, counsel respectfully urges the Court to allow the filing of this supplemental brief, which will provide a more developed response to the Court's inquiry and should correct any misimpression of petitioners' position which might have been conveyed.

October 19, 1989 Respectfully submitted,

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October Term, 1989

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In The
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October Term, 1988

M.J.R., INC., et al.,

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vs.

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On Writ of Certiorari to The
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SUPPLEMENTAL BRIEF

In oral argument, Justices Kennedy, Scalia and O'Connor asked counsel whether the Constitution would permit a court or legislature to authorize the withholding of a license for a bookstore or other speech-related business as part of a sentence for a criminal offense. Because the answer to that question is pivotal to a proper analysis of the critically important prior restraint issues in this case, petitioners submit the following supplemental response.

Depending upon whether the predicate crime is a speech offense or a non-speech violation, a sanction expressly prohibiting future, presumptively-protected speech is a prior restraint and either per se invalid under the rule of Near v. Minnesota, or subject to the strictest First Amendment scrutiny. There is a profound constitutional difference, from the perspective of free speech, between an ordinary criminal sanction such as incarceration, and a remedy which operates directly to suppress future expression. Any governmental edict,

SUPPLEMENTAL BRIEF

"Thou shalt not speak," must always be subject to the strict scrutiny of the First Amendment as most elementally envisioned by the Framers and as consistently interpreted by this Court.

Although incarceration has an undeniable incidental impact on expression, that impact is an indirect prohibition on speech, not a direct restraint. The primary effect of a jail sentence is simply punishment of a person, not the prospective suppression of expression. This is the pivotal distinction proclaimed in Near v. Minnesota, 283 U.S. 697, 710-712 (1931):

> "The object of the statute [allowing injunctions against future publications] is not punishment in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression of the evils of scandal.'" 283 U.S. at 711.
>
> * * *
>
> "This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute." Id. at 712.

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* * *

> "This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute." Id. at 713.

In Near, the State banned future publication on the basis of past speech violations. This Court, concluding such prospective injunctions triggered by speech offenses are the purest and most constitutionally objectionable form of prior restraint, facially invalidated the statute. As the Court later summarized Near in Kingsley Books v. Brown, 354 U.S. 436, 445 (1955):

> "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive . . . . 'This is of the essence of censorship.'" (Quoting Near, 283 U.S. at 713.)

Thus emerged a cornerstone rule of First Amendment law which should be seen as the essence of Near: a prohibition against unknown, presumptively-protected expression in the future, as a remedy for past speech offenses, is barred by the First Amendment. The Court in Near determined that such sanctions are inherently an overbroad and impermissible means

of addressing past speech abuses. This rule must apply regardless of the form in which government structures the remedy -- whether it seeks to impose an injunction as in Near, the probationary term contemplated by the Justices' questions, or the license disqualification directly at issue in this case.

If Near's distinction between traditional punishment (which only indirectly restrains speech) and sanctions which directly suppress expression were not the law, the First Amendment would provide little protection from a government hostile to one's speech. For example, a state could require all newspapers to obtain a license, and could revoke that license if the newspaper ever published a defamatory article.

This case, of course, also involves prior restraints of a different type: license disqualifications based on non-speech predicate conduct. Where the sanction denying licensure or otherwise expressly prohibiting future free-speech activity is based upon a finding of

unlawful non-speech conduct, the mode of analysis shifts from Near's per se rule to strict scrutiny. Any attempt to directly restrain or prohibit a citizen's future exercise of free speech requires the most compelling justifications to overcome the "heavy presumption against its constitutional validity" which any prior restraint brings to this Court. As eloquently stated by the Fifth Circuit Court of Appeals in Fernandes v. Limmer, 663 F.2d 619, 629-630 (1981), "Persons with prior criminal records are not First Amendment outcasts." Although certain prospective speech-inhibiting sanctions might conceivably withstand the glare of strict scrutiny, this Court has found virtually all such prior restraints unconstitutional.[1]

Prior restraint analysis is required, then, whenever the challenged sanction imposes a direct rather than an indirect restraint on expressive activity. The Court recently

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[1]See the voluminous cases cited in footnote 12 of the Brief of Petitions (M.J.R., et al.) at 25-29.

underscored this "direct vs. indirect" distinction in Arcara v. Cloud Books, 478 U.S. 697 (1986). In Arcara, non-speech criminal activity triggered the in rem closure of a particular location, which incidentally was a bookstore. The padlocking of the premises had an indirect impact upon expression, but imposed no direct restraint upon speech activity (which the proprietors were free to resume at any other location). Accordingly, it was not subject to prior restraint analysis. Had the order specifically forbidden bookselling at the offending location or elsewhere, it would have been a direct prior restraint on speech and thus subject to strict scrutiny.

Two hypotheticals prove the necessity of adhering to prior restraint analysis in the context of laws such as Dallas' which would revoke licenses to engage in speech.

(1) Suppose Martin Luther King were arrested on breach of the peace charges arising from a civil rights march, convicted and placed on probation with the condition that he not

participate in any demonstrations for five years.

(2) New York revokes the newspaper license of the Wall Street Journal because the company is one day late in payment of its sales taxes, or because unknown to its management, an employee has traded upon insider information.

These examples demonstrate the tremendous tool for censorship which such overbroad direct prior restraint remedies would place in the hands of government officials. These remedies are precisely analogous to the term of probation contemplated by the Justices' questions, and of more direct relevance, to the license disqualifications imposed by this inevitably censorial Dallas ordinance.

The questions posed by Justices Kennedy, Scalia, and O'Connor, whether courts and/or legislatures may constitutionally impose a prospective ban on speech as a condition of probation, must be analyzed under the doctrine of prior restraint. Petitioners wish to make clear their unequivocal position that such a

participate in any demonstrations for five years.

(3) New York revokes the newspaper license of the Wall Street Journal because the company is one day late in payment of its sales taxes, or because unknown to its management, an employee has stirred upon insider information.

Those examples demonstrate the tremendous tool for censorship which such overbroad direct prior restraint remedies would place in the hands of government officials. These remedies are precisely analogous to the term of prosecution contemplated by the Justices' questions, and of both direct reliance, to the license disqualifications imposed by this invidiously censorial Union tax regime.

The questions posed by Justice Kennedy, Scalia, and Chief Justice Burger, courts and/or legislatures may constitutionally impose a prospective ban on speech as a condition of probation, must be analyzed under the doctrine of prior restraint. Petitioners wish to make clear their unequivocal position that such a

probationary term would be presumptively unconstitutional, even where predicated on non-speech offenses. Unlike a jail sentence, such a probationary term would directly restrain expression and its primary object and effect would not be punishment but rather the suppression of speech. Accordingly, it would come to this Court with a heavy presumption against its validity.

CONCLUSION

The distinction between criminal punishment which may indirectly affect speech, and other governmental actions or laws which directly suppress expression, is essential to this Court's analysis of the prior restraint challenged in this case. If the prior restraint doctrine is to retain any real vitality in defense of First Amendment freedoms, this Court must continue to recognize that a law's

characterization as "subsequent punishment" is meaningless where its direct operation and effect is the immediate suppression of speech.

October 19, 1989

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Nos. 87-2012, 87-2051, and 88-49

In The
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October Term, 1988

NO. 87-2012
FW/PBS, INC., et al.,
Petitioners,
v.
CITY OF DALLAS, TEXAS, et al.,
Respondents.

NO. 87-2051
M.J.R., INC., et al.,
Petitioners,
v.
CITY OF DALLAS, TEXAS, et al.,
Respondents.

NO. 88-49
CALVIN BERRY, III, et al.,
Petitioners,
v.
CITY OF DALLAS, TEXAS, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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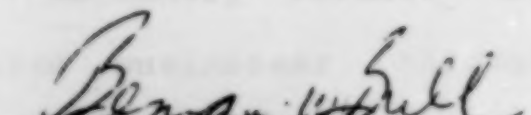
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Children's Legal Foundation, Inc. (CLF), respectfully moves for leave to file the attached brief amicus curiae. The consent of the attorney for Respondents has been obtained. The consent of the attorney for Petitioner was requested telephonically. He failed to respond, so it is assumed that consent is refused.

The interest of the amicus curiae is set out below.

Respectfully submitted,



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INTEREST OF AMICUS CURIAE

Children's Legal Foundation, Inc., formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957 by attorney Charles H Keating, Jr. Mr. Keating was a member of the 1970 Presidential Commission on Obscenity and Pornography. CLF exists to assist public officials in the enforcement and drafting of constitutional obscenity and pornography laws. It also provides legal assistance to cities and counties seeking to eradicate the "secondary effects" of sexually oriented businesses through zoning ordinances. CLF also provides public information on legal and social issues related to pornography. CLF has a legal staff of attorneys practicing exclusively in the First Amendment area.

CLF attorneys assisted in the drafting of the challenged Dallas ordinance, and have drafted numerous other similar ordinances. CLF has filed more than 50 briefs in the United States Supreme Court and has participated in trials and appeals in more than 40 states. It has more than 120 affiliated chapters across the nation representing over 100,000 supporters.

Children's Legal Foundation is profoundly concerned about the ability of communities to regulate illegal conduct and public health hazards created by sexually oriented businesses. It believes that the Dallas ordinance is a constitutional method of combatting these problems, and is necessary to the maintenance of a society where families and children are safe to walk the streets of their cities.

I. INTRODUCTION

A strong First Amendment is perhaps our nation's most vital guarantor of continued liberty. Any legislative incursion into freedom of speech must therefore be closely scrutinized. Nevertheless, the mere invocation of the terms "prior restraint" and "free speech violation" should not settle the issue. This Court must first determine whether speech rights are truly at stake.

Petitioners would like this Court to focus exclusively on the important and grand principles of the First Amendment. Amicus Curiae CLF respectfully suggests that this Court would be better served in directing its attention to the cold, hard, sordid facts relevant to this case. Those facts relate to the harmful secondary effects flowing from the illegal conduct occurring on the premises of sexually

oriented businesses. This type of ordinance is directed at those effects, and not at speech.

The truth is that these sexually oriented establishments are not in the business of communicating ideas, they are in the business of communicating diseases to the community. Their owners do not care about free speech, but about fast cash. They are in the business of catering to the base sexual gratifications of others, for profit. That desire for immediate gratification is what leads "customers" of sexually oriented businesses to engage in dubious, often illegal behavior on the premises.

CLF requests that this Court take a few moments to review the Appendices to this brief, which are transcriptions of videotapes relating to the interior of these establishments. These videotapes

graphically depict the "atmosphere" of a typical sexually oriented business: the male and female prostitutes turning tricks 24 hours per day; the overpowering smell of bodily fluids; the semen, urine and feces on the floors and walls; the anonymous sexual activity occuring through holes in the wall, etc. That is what this case is truly about. For the sake of the community's health, morals, safety and general welfare, these breeding grounds for the transmission of sexual diseases must be closely regulated.

II. THE DALLAS SEXUALLY ORIENTED BUSINESS LICENSE REQUIREMENT DOES NOT IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON PROTECTED EXPRESSION BY PROVIDING FOR DENIAL OR REVOCATION OF A LICENSE ON THE BASIS OF CERTAIN PRIOR CRIMINAL CONVICTIONS.

Petitioners assert that the provisions of the Ordinance allowing denial of a license to a person with

certain specified convictions act as an unconstitutional restraint on expression. This contention is without merit.

There is clearly no constitutional impediment to requiring sexually oriented businesses to obtain licenses.[1] The Ordinance denies licenses to persons convicted of certain crimes that are related to the crime-control intent of

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[1] Young v. American Mini Theatres, 427 U.S. 50, 62 (1976) ("The mere fact that the commercial exploitation of material protected by the First Amendment is subject to . . . licensing requirements is not sufficient reason for invalidating these ordinances"); Shuttlesworth v. City of Birmingham, 394 U.S. 147 150-51 (1969); Tyson & Brother - United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 430 (1927)("The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power ..."). See also Genusa v. City of Peoria, 619 F.2d 1203, 1212-13 (7th Cir. 1980) (court relied on Young v. American Mini Theatres to uphold license requirement for operation of adult bookstores).

the law.[2] Individuals convicted of misdemeanors become eligible for a license two years after conviction or end of confinement, whichever is later; and for felonies or multiple misdemeanors the period is five years. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1305 n.23 (5th Cir. 1988); Dumas v. City of Dallas, 648 F.Supp. 1061 (N.D. Tex. 1986). Petitioners argue that this licensing requirement acts as an unconstitutional prior restraint on the expressive activities of those

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[2]These are prostitution, obscenity, sale, distribution, or display of harmful material to a minor, sexual performance by a child, possession of child pornography, public lewdness, indecent exposure, indecency with a child, sexual assault, aggravated sexual assault, incest, solicitation of a child, and harboring a runaway child. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1304 n.19 (5th Cir. 1988); Dumas v. City of Dallas, 648 F.Supp. 1061, 1082 (N.D. Tex. 1986).

denied a license for past criminal behavior. This argument is utterly without merit.

A. The License Requirement is Content-Neutral and Bears a Substantial Relationship to the Purpose of the Ordinance.

Like the Renton ordinance in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), the Dallas Ordinance is content-neutral. The Dallas City Council adopted the Ordinance after making a number of factual findings. It found that crime rates are 90% higher in adult districts. The Council concluded that safety required regulation of sexually oriented businesses because they "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature," and because there had been a substantial number of arrests for sex-related crimes near these

businesses. They also found convincing evidence that these businesses cause "urban blight" and decreased property values. FW/PBS, 837 F.2d at 1301. Indeed the Ordinance recites that its purpose is to "promote health, safety and morals," and to prevent the "continued concentration of sexually oriented businesses." It disclaims any purpose to deny "access by adults to sexually oriented materials protected by the First Amendment." The City also considered studies of other cities regarding the relationship among concentrations of sexually oriented businesses, crime, and property values. In order to prevent increased crime, blighting, and declining property values, the Ordinance was enacted. Id. at 300.

Thus, it is content-neutral in the same way as the Detroit ordinance in

Young v. American Mini Theatres, supra, and the Renton ordinance in City of Renton. These two cases recognize that a city may regulate the effects of sexually oriented businesses without engaging in content-based regulation. They also hold that sexually explicit materials enjoy less First Amendment protection than other kinds of speech. City of Renton, 475 U.S. at 49 n.2, quoting American Mini Theatres, 427 U.S. at 70 (sexually explicit speech is afforded the lowest rung of First Amendment protection).[3] And because

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[3]This is consistent with other related cases. Patently offensive references to sexual organs and activities "surely lie at the periphery of First Amendment concern." FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978); and see Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). More recently, the Court in Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 758-9, n.5 (1985), observed

(Footnote Continued)

the Ordinance, like the City of Renton ordinance, regulates only the "secondary effects" of sexually oriented businesses, it need only meet the standards applicable to time, place, and manner restrictions. It need not comply with more stringent limits on regulation aimed at content of speech such as those discussed in Freedman v. Maryland, 380 U.S. 51 (1965). Like the ordinance in City of Renton, this Court requires only that the Dallas Ordinance be "designed to serve a substantial governmental interest" and allow for "reasonable alternative avenues of communication." City of Renton, 475 U.S. at 50.

(Footnote Continued)
that, "We have long recognized that not all speech is of equal First Amendment importance . . . [c]ertain kinds of speech are less central to the interest of the First Amendment than others..."

Since this Court did not grant a writ of certiorari on the question of whether the Ordinance provides "reasonable alternative avenues of communication," the issue before this Court is whether the licensing scheme is "designed to serve a substantial governmental interest." It clearly does. Like the City of Renton ordinance, the Dallas Ordinance is designed to serve the City's interest in maintaining "the quality of urban life." Id. at 50. This interest is advanced even though the licensing scheme may regulate aspects of the businesses' operations other than location. The kind of speech affected by the Renton license requirement and the city's justification for enforcing it are the same as for the Dallas Ordinance's locational zoning rules. Whether a license is denied because the business

is improperly located or because the business is improperly maintained, the effect is the same -- the operator must refrain from the activity. His only alternative is to comply with the ordinance and obtain a license. Genusa v. City of Peoria, 619 F.2d 1203, 1212 (7th Cir. 1980) (licensing requirements are to be treated under the same analysis as zoning); Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1060 and 1060 n. 5 (licensing requirement for content-neutral nude dancing ordinance tested under "time, place, and manner" analysis). Indeed, the "time, place, and manner" doctrine has never been limited to regulation of "place." FW/PBS, Inc., 837 F.2d at 1304.

The City's findings amply demonstrated a compelling interest in limiting the involvement of specified convicted persons in the operation of

sexually oriented businesses. They documented the strong relationship between sexually-oriented businesses and sexually related crimes. And the City established a compelling justification for barring those prone to such crimes from the management of these businesses.

Moreover, the City's findings are supported by the accepted rule that the government may attach to criminal convictions disabilities aimed at preventing recidivism. See De Veau v. Braisted, 363 U.S. 144, 158-59 (1960) (plurality opinion)("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas."); 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973) (per curiam) (holding that the First Amendment permits revocation of theatre license for violation of law against

sexually explicit screenings); cert. denied, 422 U.S. 1044 (1975). Indeed the Supreme Court's recent decision in Fort Wayne Books, Inc. v. Indiana, ___ U.S. ___, 103 L.Ed.2d 34, 109 S.Ct. 916 (1989), reaffirmed this doctrine emphatically. There the Court upheld closure, and forfeiture to the state, of an entire bookstore as punishment for an obscenity conviction. The Court rejected an argument similar to Petitioners' -- that closure of a sexually oriented business as punishment for an obscenity RICO conviction was an unconstitutional prior restraint. The Court held that the restraint on presumptively protected speech activities was not an unconstitutional prior restraint. And see discussion FW/PBS, Inc., 837 F.2d at 1305 (occupational limitations frequently follow criminal conviction, and can

include First Amendment activities such as labor organizing).

The license ineligibility resulting from certain convictions is clearly suitably tailored to achieve the stated purpose of the Ordinance. Ineligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses.[4]

B. As a Content-Neutral Regulation, the License Scheme Does Not Result in an Unconstitutional Prior Restraint.

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[4]The district court scrutinized the list of crimes that would make an applicant ineligible for a license and invalidated those it found to have no relationship to the purpose of the Ordinance. These offenses include kidnapping, robbery, bribery, controlled substances violations, and "organized criminal activities." Dumas, 648 F.Supp. at 1074.

Where, as in the instant case, the purpose of the license restriction is unrelated to the incidental prohibition on expressive conduct, no unconstitutional prior restraint occurs. Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), is squarely on point. There the Court held that a sexually related business could be closed when management was aware of sexual behavior on the premises, in violation of law. Id. at 702. As in the instant case, the criminal conduct was prostitution. The Court made clear that where the purpose of the statute is unrelated to the suppression of speech (i.e., content-neutral), the incidental restraint on expressive conduct is not unconstitutional. And see Commonwealth v. Croaton Books, 323 S.E.2d 86, 89 (Va. 1984) (upheld closure of sexually oriented business based on evidence of

illegal homosexual activity on the premises). If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied a license. See 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044 (1975); Barrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D. Ky. 1978); Airport Bookstore, Inc. v. Jackson, 248 S.E.2d 623 (Ga. 1978), cert. denied sub. nom. Gateway Books v. Jackson, 441 U.S. 952 (1979). One intent of the Ordinance is to prevent crime; its purpose is not to suppress speech. Incidental impact on expressive conduct is not an unconstitutional prior restraint. Arcara, supra.

Indeed, merely alleging as Petitioner does that something is an unconstitutional prior restraint on free

speech does not advance this Court's inquiry in any meaningful way. As this Court stated in Kingsley Books v. Brown, 354 U.S. 436, 441-42 (1957):

> "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539."

Analyzing the instant case in this way, as suggested by the Court in Kingsley Books, is useful. If a bookseller, having fallen behind on his property taxes, loses his business license and is

forced to close his store, it is absurd for him to complain that the city has imposed an unlawful prior restraint upon his bookselling activities. If a bookseller is convicted of the crime of distributing obscene materials, child pornography, or prostitution, he may be imprisoned. But it is absurd for him to argue that his incarceration constitutes a prior restraint on his ability to disseminate protected speech, even though his speech is quite clearly restrained by his inability to operate the bookstore. The same is true in the instant case because the restraint on expressive activities is incidental to, and not the purpose of, the Ordinance. And see Arcara, supra

Contrasting Near v. Minnesota, 283 U.S. 697 (1931), relied on by Petitioners, with the instant statute is instructive. The State of Minnesota had

commenced a statutory nuisance abatement action against Near and his newspaper, alleging it to be "malicious, scandalous and defamatory." After a trial, the district court found that the defendants did regularly publish a malicious, scandalous and defamatory newspaper, and that such newspaper was therefore subject to abatement as a nuisance. The court also perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." Id. at 706. The Supreme Court held, of course, that such an injunction constituted an impermissible prior restraint. The Court placed great emphasis on the fact that the object of the Minnesota statute

was to suppress the offending newspaper and to censor the offending publisher.

There are a number of distinctions between the Near case and the instant case, not the least of which is that Near dealt with speech critical of public officials rather than speech of a sexually explicit nature.[5] Most significantly, however, the Near injunction, as well as the injunction in Vance v. Universal Amusement Co., 445 U.S. 308 (1980), was based on the content of the publication. In the case of license revocation for conviction of a crime or non-payment of taxes, or imprisonment for conviction of a crime,

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[5]Sexually explicit speech is afforded the lowest rung of First Amendment protection. City of Renton, 475 U.S. at 49 n.2; Young v. American Mini Theatres, 427 U.S. at 70. Political speech is on the highest rung. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

the incidental restraint on future expression is not based on the content of that expression.[6]

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.'"

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[6]The typical prior restraint case deals with the government's effort to censor future expression based on its content. See, e.g., Nebraska Press Ass'n v. Stewart, 427 U.S. 539 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

Police Dept., of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). (Emphasis added, citations omitted.) The Ordinance, including the licensing regulation, is a time, place, and manner statute which is content-neutral. Its purpose is not content control but the elimination of crime, blight, and reduction of property values, which are the secondary effects of sexually oriented businesses. The focus of the statutory measure is on elimination of the secondary effects, unrelated to the content of the sexually explicit speech sold in the businesses. And like closure incidentally resulting from an illegal activity on the premises -- such as prostitution (Arcara, supra) -- the denial of a license to operate because of that conviction is not an unconstitutional prior restraint. Its

purpose is not to suppress speech but to prevent increased criminal behavior in and around sexually oriented businesses. See, e.g., State ex rel. Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 (Idaho 1981), jurisdiction noted 454 U.S. 1140 (1982), appeal dismissed by Appellant U.S. Marketing, Inc., 455 U.S. 1009 (1982).

III. THE DALLAS SEXUALLY ORIENTED BUSINESS LICENSE ORDINANCE DOES NOT UNCONSTITUTIONALLY SINGLE OUT PERSONS AND BUSINESSES ENGAGED IN FIRST AMENDMENT ACTIVITIES FOR REGULATION CONTRARY TO ARCARA V. CLOUD BOOKS

Petitioners argue that because the Ordinance, especially its license provisions, singles out sexually oriented businesses, it is unconstitutional under the First Amendment. Petitioners primarily rely on their own characterization of Justice O'Connor's concurring opinion in Arcara

v. Cloud Books, Inc., supra. Petitioners' argument is utterly without merit.

This Court has categorically resolved this issue against Petitioner. In Young v. American Mini Theatres, supra, the Court considered whether a classification based on the sexually explicit content of material sold at a certain location passed constitutional muster as a content-neutral time, place, and manner regulation.

> "The principle question presented by this case is whether that statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment."

427 U.S. at 52. The Court upheld the classification based upon sexually explicit but protected speech. The Court ruled that "[r]easonable regulations of the time, place, and manner of protected speech, where those

regulations are necessary to further significant governmental interest, are permitted by the First Amendment." Id. at 63 n.18.[7] In specifically addressing content-based licensing, the Court stated:

> "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and licensing requirements is not a sufficient reason for invalidating these ordinances."

Id. at 62 (emphasis added). The Court specifically held that the content of sexually explicit material could be the basis for separate classification and

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[7]The Court cited Kovacs v. Cooper, 336 U.S. 77 (1948) (limitation on use of sound trucks); Cox v. Louisiana, 379 U.S. 559 (1965) (ban on demonstrations in or near a courthouse with the intent to obstruct justice); Grayned v. City of Rockford, 408 U.S. 104 (1972) (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

treatment under a licensing and zoning statute.

> "Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."

Id. at 70-71.

> "[E]ven though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures."

Id. at 71.

In City of Renton, supra, the Court reaffirmed its holding in Young, ruling that a classification based upon the content of sexually explicit material does not violate the Equal Protection Clause. 475 U.S. at 55, n.4. The Court held that this type of classification is

a valid content-neutral time, place, and manner regulation because it serves a substantial governmental interest and is "justified without reference to the content of the regulated speech." Id. at 48, quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

Lower courts have followed the Supreme Court in upholding licensing of commercial establishments dealing in sexually oriented material. For example, Genusa v. City of Peoria, 619 F.2d 1203, 1212 (7th Cir. 1980), upheld a Peoria license ordinance making "it unlawful for anyone to operate an adult bookstore in Peoria without first obtaining a license." Under a constitutional challenge similar to the instant case, the Seventh Circuit held that "under Young v. American Mini Theatres, Inc., supra, 427 U.S. at

62-63, 96 S.Ct. at 2448, the requirement of a license is also constitutional."

> It is rationally related to the goal of "inverse," or scatter zoning of adult uses; it provides both a method for authorities to enforce scatter zoning and means of assuring those who seek to open a new adult use of the legality of the proposed site.

Id. Similarly see Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1171 (4th Cir. 1986); SDJ, Inc. v. City of Houston, 636 F.Supp. 1359, 1368 (N.D. Tex. 1986), aff'd 837 F.2d 1268 (5th Cir. 1988); O'Day v. King County, 749 P.2d 142 (Wash. 1988); Schope v. State, 647 S.W.2d 675 (Tex.Civ.App. 1982); Airport Bookstore, Inc v. Jackson, 248 S.Ed.2d 623 (Ga. 1978).

Finally, contrary to the contention of Petitioners, the fact that an ordinance applies to businesses of a particular type does not make it a content-based regulation, as this Court

stated in Young and City of Renton. The Ordinance is a valid legislative decision by the City to treat sexually oriented businesses differently because they have "markedly different effects upon their surroundings." Young, 427 U.S. at 82, n.6 (Powell, J., concurring).

IV. THE ORDINANCE PROVIDES ADEQUATE PROCEDURAL SAFEGUARDS AND IS CONSISTENT WITH THIS COURT'S DECISIONS

Petitioners argue that the Ordinance's procedural safeguards are inadequate to prevent the licensing requirements from acting as a prior restraint. This argument is without merit.

Petitioners contend that the Ordinance is governed by and fails to meet the standards of Freedman v. Maryland, 380 U.S. 51 (1965). However, Petitioners' assertion misses the mark

because the Freedman standard does not apply to a content-neutral statute such as the Dallas Ordinance. FW/PBS v. City of Dallas, 837 F.2d at 1303; Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1060 (9th Cir. 1986); Bayside Enterprises, Inc. v. Carson, 470 F.Supp. 1140, 1149 (M.D. Fla. 1979). As noted by the court below, after the City of Renton decision, a content-neutral ordinance which regulates the effects of sexually oriented businesses without engaging in content-based regulation ". . . need only meet the standards applicable to time, place, and manner restrictions and need not comply with Freedman's more stringent limits on regulation aimed at content." FW/PBS, 837 F.2d at 1303.

As discussed previously, First Amendment protection for nonpornographic expression is greater than that afforded sexually explicit speech. City of

Renton, supra; Young, supra. Further, the actual issue here is the effect sexually oriented businesses have on their surroundings, not the content of the sexually explicit speech itself. This is contrasted with Freedman where the only issue was the explicit content of a particular film. What is being addressed here is not a particular movie; rather, it is the detrimental impact on surroundings caused by long-term sexually oriented commercial businesses.

The cases cited by Petitioners in support of their Freedman argument are easily distinguishable. Each of them involves content-based regulations whose only purpose was suppression of speech. The regulations involved in City of Paducah v. Investment Entertainment, 791 F.2d 463 (6th Cir. 1986), cert. denied 93 L.Ed.2d 290 (1986), and Entertainment

Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied 450 U.S. 919 (1981), were local obscenity ordinances that called upon a city board to review particular films and make administrative findings of obscenity. In Freedman, the Maryland statute at issue actually required the films to be licensed, and directed the Board of Censors to deny licensure to films deemed "obscene, or such as tended, in the judgment of the Board, to debase or corrupt morals . . ." Freedman v. Maryland, 380 U.S. at 52, n.2. The Dallas Ordinance is not a content-based statute, but is content-neutral and is designed to curb the harmful secondary effects of certain commercial businesses. It is not concerned with the content of expression itself.

Finally, even if this Court should find that the Freedman standard does

apply to content-neutral, time, place, and manner ordinances, the Dallas statutory scheme satisfies Freedman. As the District Court below held:

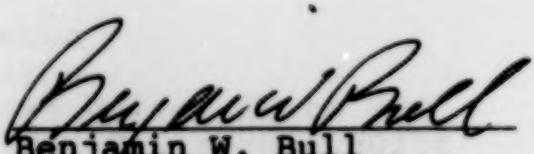
> "The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards, and comport with Freedman and fundamental tenets of due process."

Dumas v. City of Dallas, 648 F.Supp. at 1075.

V. CONCLUSION

For the foregoing reasons, this Court should uphold the Dallas Ordinance licensing provisions in their entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amicus Curiae Children's Legal Foundation have been sent by U.S. Mail, Postage Prepaid, on this 20th day of July, 1989, to:

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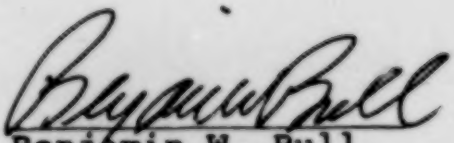

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TRANSCRIPTION OF VIDEOTAPE RELATING TO THE INTERIOR OF SEXUALLY ORIENTED BUSINESSES WITH ALAN SEARS, EXECUTIVE DIRECTOR OF CHILDREN'S LEGAL FOUNDATION AND DET. VINCENT RIZZITELLO, OF THE FT. LAUDERDALE POLICE DEPARTMENT, ORGANIZED CRIME DIVISION. (A copy of this video tape has been lodged with the Clerk of Court.)

Mr. Sears: We have a film that you brought from Florida with us today that we would like to take a quick look at. Vince, I would like you to tell the officers who are listening to this tape, I know there is a real different level of experience between those that are watching this tape, between those who have been deeply involved and who have briefly ~~been~~ involved. I would like you to tell us a little about what goes on in these porn outlets.

Det. Rizzitello: Basically, several years ago in one of our investigations, we got a court order to go inside one of

our adult bookstores and video the inside because we could not get a judge to go down and see it for himself so we wanted to represent to him exactly what the atmosphere was like.

What you are seeing now is the back room where the videos are played and the 8 mm movies and this is a marquee section. Basically, it shows films that are offered for viewing in each booth and the customer would go in, you can see there is about 150 films there, decide what film he wanted to view and then go to that particular numbered booth and drop his quarter so he could view about 2 minutes of that film.

Mr. Sears: Now, you have a lot of light in here for your television film. What is the normal situation in these back rooms.

Det. Rizzitello: The way that area was lit up was basically because of our camera that we had. Normally it is a black light atmosphere and you basically have to feel your way around this area. Again, these people knew we were coming so the patrons were removed and it is very sanitary right now. I wish I could bottle the smell or the feeling when you walk in there -- there is just no way of representing it on a piece of tape like this. That is why we wanted the judge to experience it but second best, we got a piece of film that we could have the judge look at and try to interpret it to him basically what these areas are. That they are really masturbation parlors.

Mr. Sears: And in addition to masturbation, other types of sexual activities take place.

Det. Rizzitello: Absolutely, these are the booth's doors, so once you leave the marquee, the patron would find a particular booth he was interested in.

Mr. Sears: This looks like a pretty good size place. What have we got 25 or 26 booths?

Det. Rizzitello: This has 50 booths. This is just one side of it. These booths on this side are mainly smaller booths where maybe one or two people could get in together and on the other side was called the group booths where you get 5 or 6 people. Right now you are looking at a long hallway shot. Normally, this is crowded with individuals going from one booth to the next booth.

Mr. Sears: What is this we are looking at now?

Det. Rizzitello: You are looking at the screen. This is the screen when the customer goes in, he closes the door and the film is shown on the screen. The stains you see on the wall are semen stains, there is no doubt. This is what people do, they go in there and watch a sexually explicit film, they masturbate or they participate in sex with someone else. That is exactly what they are for. These are not for connoisseurs of adult-type films who go in and critique them. This is raw sex.

Mr. Sears: What is this you are pointing to, this writing on the wall?

Det. Rizzitello: This is a normal technique used for advertising for

people to advertise their particular perversion hoping someone will respond. Again, the stains on the wall are the evidence itself or what actually occurs in these booths. The owners will claim that all that occurs is movie viewing, but they are cesspools.

Newscenter 13

Eau Claire, Wisconsin

(A copy of this video tape has been lodged with the Clerk of Court.)

Reporter: Tonight on "AIDS In A Small Town" we continue to tell you the story of a man we call Rick. Tonight the story is of a man spreading a virus.

Rick: I will never tell anyone what I have. That is kind of stupid.

Reporter: Why is that?

Rick: It kills your sex life.

Reporter: We have introduced to you a man we are calling Rick. Rick is homosexual, he lives in Eau Claire, and he carries the AIDS virus. What we haven't told you yet is that he claims

to be spreading the virus by having anonymous sex with other men. Does that bother you at all that you are spreading the disease?

Rick: No, I look at it as to the point that in riding in a car. If you get into a car with somebody and there is a seatbelt available to you and you don't use it and you get killed, whose fault is it? To a point I feel a little guilty but I always have condoms and if no one wants to use them or no one suggests it then hey, whose fault is it?

# # #

Harlan Heinz, Psychologist: It is not much different from the killer, the person who goes around murdering people without a conscience. I think that is a similar kind of lack of character

development. I think that that is an exception. Some people who feel that they are going to die in a few years would have this attitude. But I think that's few, I think that's an exception and it is a person without a conscience or without any kind of feeling for the welfare of mankind.

# # #

Dr. Michael Finkel: Anyone who continues to behave irresponsibly in such matters should have some sort of penalty. There should be some way that we can stop these people.

# # #

Dr. Ken Alder: This is really distressing. I think that a person who does these things is very definitely a risk to other peoples' health.

# # #

Harlan Heinz, Psychologist: It is very difficult to treat a person like this and I think that basically you would not be able to cure this person. This mind would be very difficult to reach.

# # #

Reporter: Right now, Wisconsin has no law specifically against the spreading of AIDS. But there could be a law coming very soon.

Gov. Tommy Thompson: I don't know if we want to classify it as a felony but I am certainly looking at some sort of criminal sanctions.

Reporter: Can you get specific at all?

Gov. Tommy Thompson: We haven't really resolved or made a final decision on it. We are looking at a lot of legislation this year to protect the citizens...

# # #

Reporter: Rick says if Thompsons's administration gets a law approved restricting the spread of AIDS, he will obey it. But until then he will continue his lifestyle and that includes anonymous sex with other men.

How are you doing that, where all do you have sex?

Rick: Basically, I go to all the bookstores.

Reporter: Eau Claire's adult bookstores show adult movies inside private booths.

Booths no larger than a small closet. But in many of the booths, there are small holes made in the walls. The holes are about waist high off of the floor.

Who do you meet in these rooms?

Rick: I have seen a few married men in there.

Reporter: Do you have most of your sex in adult bookstores?

Rick: Yeah.

Reporter: Is that the easiest way for you to have sex is through these holes?

Rick: Very easy.

# # #

Reporter: You have a hole in one of your booths. Why is that hole there?

Bookstore owner: That hole was there when the booth came down here from Chicago. And it has been there ever since I have had that booth and I have had that booth there since 1984 when they came in here with all that stuff.

Reporter: Glen Peterson runs an adult bookstore in Eau Claire. The hole in one of the booths looks as if a knot of wood was punched out. Peterson said he has tried to block it twice but he has given up because it has been repeatedly removed. Today we told him Rick's story of spreading the virus.

Does that make you want to get rid of the hole more?

Bookstore owner: Yeah. I think that I will make sure I can patch this up good where they can't tear it down again because I don't want to get sued if somebody else catches AIDS over this. So I am going to have to take care of it today, I guess.

Reporter: And although it seems Glen Peterson knows what he is going to do, the City of Eau Claire sure doesn't seem to. City Attorney Ted Fischer says there is no ordinance on the books dealing with the issue at this time, though Milwaukee and St. Paul do. And Councilperson Wally Rogers says it may be up to the Health Board to take action but Health Board President Tom Henry says it might be up to the city to have an ordinance first. We will have more on that as our series continues.

Nos. 87-2012, 87-2051, and 88-49

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IN THE

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OCTOBER TERM, 1989

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v.

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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36 pp

QUESTIONS PRESENTED

1. Whether a city may preclude persons who recently have been convicted of certain specified sexual offenses from operating a sexually oriented business.
2. Whether a city may impose special regulations on sexually oriented businesses in an effort to alleviate the secondary effects associated with such businesses, such as increased crime and declining property values.
3. Whether the licensing requirements imposed by Dallas on sexually oriented businesses effect an unconstitutional prior restraint.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

These cases present First Amendment challenges to the validity of a Dallas ordinance imposing licensing requirements on "sexually oriented businesses." The issues presented are important to *amici* and their members because they concern the constitutional limitations on state and local government efforts to protect the morals, health, and safety of their citizens from urban blight and crime.

The Court has previously upheld local government regulation directed at the secondary effects of sexually oriented businesses. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court upheld zoning restrictions aimed at businesses of this character. *See also Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). The licensing requirements in this case represent another attempt to deal with this pernicious problem.

The licensing requirements at issue in this case, although they differ in character from zoning restrictions, impose no greater restrictions on the ability of creators of sexually oriented material to reach their audience or the ability of the public to obtain access to sexually oriented fare. In fact, in many of their applications, these regulations have considerably less direct impact on First Amendment rights than did the zoning regulation upheld in *Renton*; the Dallas ordinance applies to a wide range of business activities, some of which (*e.g.*, adult motels) are completely unconcerned with freedom of expression.

The City's effort is not to restrain speech, but to exercise some control over businesses engaged in the commercial exploitation of sex, and thus to inhibit the criminal activity and health risks frequently associated

with such exploitation. The licensing requirements may be compared to similar requirements imposed on other lawful business activities (*e.g.*, liquor stores, dance halls, pawn shops) that can attract criminal elements. They are narrowly tailored to the City's strong public interest in mitigating the undesirable secondary effects associated with such businesses, without inhibiting the freedom to publish or receive, and without attempting to regulate the content of, First Amendment communications. The licensing requirements in this case do not vest in any official discretionary power that could result in censorship or suppression of particular First Amendment expression (*cf. City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988)).

Amici submit that the decision below is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, they submit this brief to assist the Court in its resolution of the issues presented.[1]

STATEMENT

A. Introduction and Description of the Dallas Ordinance

These consolidated cases involve several challenges to the constitutionality of a Dallas ordinance that regulates the conduct of sexually oriented businesses. The ordinance, Chapter 41A of the Dallas City Code (reproduced in its current, amended form at J.A. 8-37), defines the term "sexually oriented businesses" to include the following nine kinds of commercial enterprise: (1) adult arcades; (2) adult bookstores or adult video stores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theaters; (6) adult theaters; (7) escort agencies; (8) nude model studios; and (9) sexual encounter centers. Section 41A-2(19) (J.A. 14) and Section 41A-3 (J.A. 15). The ordinance also defines separately each of these kinds of sexually oriented business. Section 41A-2(1)-(6), (9), (12), and (18) (J.A. 9-13).

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[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk of the Court.

The ordinance requires a license for the operation of sexually oriented businesses and specifically identifies the circumstances in which a license will not be granted. Sections 41A-4 and 41A-5 (J.A. 16-20). The ordinance also limits the locations in which sexually oriented businesses may be conducted (Sections 41A-13 and 41A-14 (J.A. 26-30)), and it establishes particular regulatory requirements for certain kinds of sexually oriented businesses and for the exhibition and display of sexually explicit films, videos, and other materials (Section 41A-15 to 41A-20 (J.A. 30-35)).

The ordinance was originally adopted in June 1986, by unanimous vote of the Dallas City Council, acting on the unanimous recommendation of the Dallas City Plan Commission. Pet. App. 41.[2] Public comments at a City Council hearing on the Plan Commission's recommendation unanimously favored adoption of the proposed ordinance. *Ibid.*

The purpose of the ordinance is "to promote the health, safety, morals, and general welfare of the citizens of [Dallas], and . . . to prevent the continued concentration of sexually oriented businesses within the city." Section 41A-1(a) (J.A. 8-9). As the legislative history shows, and as the district court found (Pet. App. 42), Dallas sought to "control[] the secondary effects of sexually oriented businesses on surrounding neighborhoods." In addition, the City sought to protect the patrons of such establishments and the citizenry in general from unsanitary and unsafe conditions. Dallas wished to reduce the crime frequently associated with sexually oriented businesses, to deter the spread of urban blight, and to preserve property values. *Id.* at 43. The City Council "did not intend to limit access by adults to sexually oriented material protected by the first amendment." *Ibid.*

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-2012.

B. The Initiation of These Consolidated Actions

Immediately after the ordinance was adopted, petitioners sued to enjoin its enforcement. Between June 30 and July 17, 1986, three lawsuits were filed in the United States District Court for the Northern District of Texas.

Plaintiffs in the first case, petitioners in No. 87-2012, are numerous corporations and individuals that operate businesses in Dallas selling, exhibiting, or distributing sexually explicit publications, videotapes, or motion picture films. The businesses operated by these petitioners fall within one or more of several of the categories of sexually oriented businesses enumerated in the Dallas ordinance, including adult arcades, adult bookstores or adult video stores, adult motion picture theaters, and adult theaters.

Plaintiffs in the second case, petitioners in No. 87-2051, are corporations that operate "nightclubs" in Dallas where they present "entertainment programs" that consist of "semi-nude dancing." Amended Complaint ¶¶ 1, 9. The businesses operated by these petitioners fall within the "adult cabaret" category of sexually oriented businesses, as defined in the Dallas ordinance. M.J.R. Br. at 2; J.A. 10.

Plaintiffs in the third case, petitioners in No. 88-49, are owners and operators of motels in Dallas that rent their motel rooms for various periods of time, including two-hour increments. The businesses operated by these petitioners fall within the "adult motel" category of sexually oriented businesses, as defined in the Dallas ordinance. Berry Br. at 4; J.A. 10-11.

Petitioners mounted a blunderbuss constitutional challenge to the ordinance, alleging that nearly every provision in Chapter 41A violates one or more of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments. The complaint in No. 87-2012, for example, contained more than 80 separate paragraphs or subparagraphs that purported to identify various constitutional flaws in part or all of the challenged ordinance. As the

district court observed (Pet. App. 45), however, petitioners' "main attack" focused on the ordinance's zoning restrictions on the location of sexually oriented businesses. Section 41A-13 (J.A. 26-28).

C. The District Court's Decision

The district court disposed of all three complaints on cross-motions for summary judgment (Pet. App. 39-70). The court sustained the validity of the Dallas ordinance, with the exception of four relatively minor provisions that have since been deleted or amended and are not at issue here.

Having reviewed the record of the ordinance's consideration by the City Plan Commission and the City Council, the district court found that "[t]he intent of the City in passing the Ordinance was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself" (Pet. App. 42). The court considered the interests that the ordinance was intended to serve, including "crime control, protection of property values, and prevention of urban blight," and found that those interests are "both important and substantial" (*id.* at 47). The court further found that "[t]he legislative response to the secondary effects of sexually oriented businesses evinced a clear intent to leave alternative avenues open for expression of that genre, while lessening the effects of such businesses on the surrounding community" (*id.* at 47-48).

Based on these findings, and relying on this Court's decisions in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the district court upheld the zoning restrictions in the Dallas ordinance in their entirety. Pet. App. 48-49. The court also found "no constitutional impediment to the concept of requiring sexually oriented businesses to obtain licenses and pay reasonable fees" (*id.* at 50; footnotes omitted).

Turning to the specific features of the Dallas licensing scheme, the district court ruled that the ordinance's license eligibility criteria and licensing procedures are generally valid. Pet. App. 50-55.

In particular, the court upheld the basic concept of Section 41A-5(a)(10) of the ordinance, which makes licenses unavailable, for a specified period of years, to persons who have been convicted of any of an enumerated list of felony or misdemeanor offenses.[3] The court said that "denial of licensure to those convicted of certain specified crimes that are related to the crime-control intent of the law is undoubtedly permitted" (Pet. App. 53). The court decided, however, that five of the crimes enumerated in the ordinance as originally adopted were not "sufficiently related to the purpose of the ordinance to withstand scrutiny" (*ibid.*).[4] The court also ruled that the ordinance could not properly direct that licenses be withheld from persons "under indictment or misdemeanor information" for (but not recently convicted of) any of the enumerated offenses. *Id.* at 53-54, 83. A month after the district

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[3] The waiting period imposed by the ordinance is five years from conviction or release from confinement for felonies and multiple misdemeanor offenses, and two years from conviction or release from confinement for single misdemeanor offenses. Section 41A-5(a)(10)(B) (J.A. 19-20).

[4] The enumerated offenses that the court found "clearly related" to the purposes of the ordinance include prostitution; promotion of prostitution; aggravated promotion of prostitution; compelling prostitution; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault or aggravated sexual assault; incest, solicitation of a child, or harboring a runaway child; and criminal attempt, conspiracy, or solicitation to commit any of the foregoing. Pet. App. 53; J.A. 19.

The five enumerated offenses that the court found "not sufficiently related" to the purposes of the ordinance were "(1) a controlled substance act violation, (2) bribery, (3) robbery, (4) kidnapping, [and] (5) organized criminal activity" (Pet. App. 53; see also *id.* at 107).

court's decision, the Dallas City Council amended the ordinance to delete those portions of Section 41A-5(a)(10) that the court had held invalid. Pet. App. 106-107.

With respect to the procedures established by the ordinance for granting or denying sexually oriented business licenses, the district court held that "the largest part of the licensure section is constitutional" (Pet. App. 52). The court explained that, with two minor exceptions, "[t]he findings the police chief must make in licensing sexually oriented businesses are based on objectively determinable facts, and are thus permissible" (*ibid.*)

The two exceptions to this general conclusion, in the court's view, were Sections 41A-5(a)(8) and 41A-5(c). The first of these provisions required the police chief to deny a license to any applicant who

> has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and *has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.*

(Pet. App. 83; emphasis added). The second provision dealt with license applications from persons convicted of one of the specific offenses enumerated in the ordinance. Under Section 41A-5(c), such a person could be granted a license, after the prescribed waiting period following his conviction, but only if the police chief determined that he was "presently fit" to operate a sexually oriented business. The section listed several factors that the police chief was to consider in making his determination of "present fitness."

The district court found that both Section 41A-5(a)(8) and Section 41A-5(c) required the police chief "to make subjective judgments on the fitness of an applicant" (Pet. App. 51), and the court therefore held that the two subsections "vest unfettered discretion in the police chief, and cannot survive constitutional scrutiny" (*id.* at 52). Since the district court's decision, the Dallas City Council has deleted the "present fitness" requirement from Sec-

tion 41A-5(c) and has modified Section 41A-5(a)(8) so as to limit the disqualification based on inability to operate a sexually oriented business "in a peaceful and law-abiding manner" to circumstances in which an applicant's recent operation of such a business has "necessitat[ed] action by law enforcement officers." Pet. App. 106, 108-109; J. A. 18, 20.

Finally, the district court rejected numerous vagueness and overbreadth challenges to the ordinance's definitions of the various categories of sexually oriented businesses and other terms, and the court upheld the ordinance's various restrictions on the "operation, layout, design, and furnishing" of regulated businesses. Pet. App. 55-57.

D. The Court of Appeals' Decision

The court of appeals affirmed the district court's decision. Pet. App. 1-30. The court began by addressing petitioners' contention that the ordinance's licensing requirement is invalid under *Freedman v. Maryland*, 380 U.S. 51 (1965), because of three alleged procedural deficiencies (Pet. App. 5):

> it places the burden of proof upon the licensee to prove that a license was wrongfully denied; it fails to provide for prompt determination of the appeal; and it fails to provide assurance of a "prompt final judicial determination."

In rejecting this argument, the court observed that the Dallas ordinance regulates ongoing commercial enterprises, not the content of individual books or films. *Id.* at 8-9. Unlike the state statute invalidated in *Freedman*, which prohibited the exhibition of any motion picture not first submitted to and approved by the State Board of Censors, the Dallas ordinance does not ban the publication, distribution, or exhibition of any film, writing, or other form of expression.

In holding that the Dallas ordinance does not trigger the procedural requirements of *Freedman*, the court of appeals relied heavily on *City of Renton v. Playtime*

Theatres, Inc., 475 U.S. 41 (1986). Pet. App. 7-9. The court observed that the challenged ordinance "regulates only the secondary effects of sexually oriented businesses," and that under *Renton* a city may regulate such secondary effects without engaging in the kind of "content-based" regulation that would activate the procedural safeguards in *Freedman*. *Id.* at 8.

The court of appeals also sustained the zoning restrictions in the Dallas ordinance. The court found that the ordinance furthers a substantial government interest in maintaining the quality of urban life and that the ordinance "allows reasonable alternative avenues of communication" (Pet. App. 9). Under these circumstances, the court had little difficulty in concluding that the Dallas zoning is valid, under the principles enunciated in *Renton*.

The court of appeals next rejected challenges to several specific features of the licensing system established by the ordinance. The court characterized the ordinance's prohibition against granting licenses to persons recently convicted of certain enumerated crimes as "a form of disability commonly attending convictions" (Pet. App. 12), and it found that under the amended ordinance "[i]neligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses" (*id.* at 13). Having found that "[t]he relationship between the offense and the evil to be regulated is direct and substantial," the court concluded that the ordinance's mandatory waiting period following an applicant's conviction for an enumerated crime is constitutionally acceptable. *Ibid.*

Similarly, the court of appeals found no constitutional problem with the degree of discretion exercised by the chief of police under the amended ordinance (Pet. App. 13-14); the authorization in Section 41A-7 for police, health, fire, and building inspections of sexually oriented businesses at any time such a business is "occupied or open for business" (*id.* at 14); the requirement in Sec-

tion 41A-19 that viewing booths for films and video cassettes be open to direct view from the manager's station (*id.* at 11); or the classification as an adult motel of any establishment that offers a sleeping room for rent for a period of less than 10 hours (*ibid.*).

Judge Thornberry concurred in part and dissented in part. Pet. App. 17-30. He dissented only with respect to those sexually oriented businesses that, in his view, "directly implicate the First Amendment, such as the adult book stores, adult video stores, and adult motion picture theaters" (*id.* at 17). Even as to these businesses, Judge Thornberry dissented from only three aspects of the majority's decision. Although he agreed with the majority that the Dallas ordinance is "content-neutral" because "it can be justified by a desire to fight crime and urban blight—interests unrelated to the suppression of particular speech" (*id.* at 19-20; see also *id.* at 23), Judge Thornberry nevertheless sought to distinguish the Dallas licensing system from the zoning ordinance upheld in *Renton* (*id.* at 22-23). In his view, "[t]he denial of a license is a complete ban on speech" (*id.* at 23) and "the classic prior restraint" (*id.* at 19). For that reason, he concluded, the licensing ordinance cannot be analyzed as a mere "time, place, and manner restriction," and the procedural protections described in *Freedman* must apply. *Id.* at 18-19, 23-25.

Judge Thornberry also dissented with respect to Section 41A-7's authorization of inspections of sexually oriented businesses and with respect to the requirement in Section 41A-5(a)(6) that applicants for licenses to operate such businesses be approved by the health, fire, and building departments as being in compliance with applicable law. Pet. App. 25-26. He would have held these provisions unconstitutional because, he said, they are applicable only to sexually oriented businesses, not to businesses generally.

Finally, Judge Thornberry would have invalidated Section 41A-5(a)(10), the provision that makes licenses

unavailable for a period of years following an applicant's conviction of any of several enumerated sexual offenses. Pet. App. 27-28. He stated that the burden imposed by this provision is a heavy one and that the restriction should not be permitted in the absence of strong evidence that allowing recently convicted sex offenders to operate sexually oriented businesses would surely result in direct, immediate, and irreparable damage. *Id.* at 28.

E. Proceedings in This Court

After the court of appeals' decision, petitioners moved in this Court for "recall and stay" of the mandate of the court of appeals. It is not at all clear why petitioners wanted a stay of the mandate. Even before the court of appeals' decision, Dallas was free to enforce its amended ordinance, and the court of appeals' decision did not change the status quo. Staying the mandate therefore should have had no practical effect. Nonetheless, petitioners sought this relief, and, on May 4, 1988, the Court stayed the judgment of the court of appeals, "except for its holding that the provisions of the ordinance regulating the location of sexually-oriented businesses do not violate the Federal Constitution" (Pet. App. 38). Although the stay, by its terms, does not seem to limit the City's ability to enforce its ordinance, Dallas appears to have interpreted the stay as an injunction against such enforcement. Since the entry of the stay, therefore, Dallas apparently has enforced only the zoning restrictions, not the licensing provisions, of the disputed ordinance.

In February 1988, this Court granted the petitions for certiorari in all three cases. The Court limited its grant of review so as to exclude those questions in No. 87-2012 and No. 87-2051 that sought to challenge the Dallas zoning restrictions. Pet. App. 7.

SUMMARY OF ARGUMENT

Although their arguments are multifarious, petitioners essentially contend that Chapter 41A violates the First Amendment in three ways. First, petitioners argue that the provisions denying licenses to certain convicted criminals infringe a First Amendment right of those criminals to operate sexually oriented businesses. Second, petitioners argue that Chapter 41A as a whole impermissibly treats sexually oriented businesses differently from other businesses through its special licensing and inspection requirements. Finally, petitioners argue that Chapter 41A effects an unconstitutional "prior restraint" on speech both in requiring licenses and in permitting license denial under the circumstances specified in the ordinance.

I.

Those provisions of the Dallas ordinance that forbid persons recently convicted of certain crimes from operating sexually oriented businesses do not infringe petitioners' First Amendment rights. Chapter 41A was enacted pursuant to the City's police power to regulate for the purpose of protecting and promoting public health and safety. A well-established incident of this police power is the right to bar from certain occupations persons who have committed crimes. Thus, a person responsible for the operation of a sexually oriented business should not have a recent history of committing sex crimes because, as the Dallas City Council found in this case, an individual in such a profession would be faced with repeated opportunities for recidivism.

The First Amendment's principal concern is to protect the freedom to speak and to listen, to read and to write, to express and to receive a broad spectrum of views and messages. The First Amendment is not primarily concerned with protecting the profit-making activities of commercial enterprises. As operators of sexually oriented businesses, petitioners are neither creators nor recipients of expression. They are merely intermediaries, persons

seeking to sell sexually explicit materials or performances. But, for First Amendment purposes, one vendor of such fare is the same as the next. Protected material is amply available in Dallas in sexually oriented businesses not operated by convicted criminals.

Furthermore, there is no record that any individual petitioner has been denied a license to operate because he or she has been convicted of one of the enumerated offenses. And, of course, Chapter 41A does not abridge in any way the First Amendment interest of any person, convicted sex offender or not, to create or to receive sexually explicit fare.

Because the restriction against convicted sex offenders affects those persons exclusively and because it affects only their economic interests, the restriction ought to be analyzed under the Equal Protection Clause of the Fourteenth Amendment, not as an infringement of fundamental rights. The "occupational disability" imposed by the Dallas ordinance is rationally related to the legitimate state interest of protecting public safety. Petitioners themselves do not argue to the contrary.

II.

Chapter 41A does not impermissibly discriminate against sexually oriented businesses by subjecting them to licensing and other requirements. Such businesses are historically, and on this record, associated with crime, including prostitution, and with casual sexual liaisons that implicate the corresponding health risk of sexually transmitted disease. Thus, the requirement of licensing, regulations governing the layout of booths where sexually explicit videos are shown, and the requirement that sexually oriented businesses permit inspection by police, health, and other municipal departments, are all directly related to the peculiar problems and characteristics associated with sexually oriented businesses.

III.

The fact that the Dallas ordinance requires sexually oriented businesses to be licensed and permits applications for such licenses to be denied under specified circumstances does not make Chapter 41A an unconstitutional prior restraint. Impermissible prior restraints fall within one of two categories. Some unconstitutional prior restraints impermissibly vest broad licensing discretion in an official. Others seek to screen protected material, thus allowing censorship. Chapter 41A falls within neither category. No section vests licensing discretion in the licensing official, who is required to issue a license within 30 days if certain objectively ascertainable criteria are met. No section authorizes screening or censorship of sexually oriented speech.

Licenses are denied under Chapter 41A not because of any particular material sold in a sexually oriented business but because of a proprietor's failure to comply with the ordinance. With the exception of the temporary disqualifications applicable to convicted sex offenders, compliance is entirely within the control of the license applicant at the time of application. If an applicant is denied a license, he need only conform to the requirements of Chapter 41A. Accordingly, the procedural requirements mandated when the content of speech or expression is reviewed before publication are not implicated by Chapter 41A.

ARGUMENT

I. THE CONSTITUTION DOES NOT CONFER UPON CONVICTED SEX OFFENDERS THE RIGHT TO OPERATE SEXUALLY ORIENTED BUSINESSES

Petitioners first challenge the constitutionality of those provisions of the Dallas ordinance that prevent criminals convicted of certain crimes from obtaining licenses to operate sexually oriented businesses.[5] Petitioners argue

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[5] In addition to Section 41A-5(a)(10), which makes sexually oriented business licenses unavailable to persons recently convicted of any enumerated offense, Section 41-A-10(b)(5) requires that an

that these provisions effect an "absolute ban upon future protected expression" and that the ordinance therefore "bears a 'heavy presumption against its constitutional validity.'" M.J.R. Br. at 34 (*quoting Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980)); FW/PBS Br. at 12-20. But this argument assumes the answer to the question at issue: whether a person recently convicted of one or more sexual offenses has a First Amendment right to operate a sexually oriented business.

A. A City's Broad Police Power To Protect The Health And Safety Of Its Citizens Encompasses The Right To Ban Convicted Criminals From Certain Occupations

The offenses that temporarily disable certain recently convicted criminals from obtaining licenses are sexual offenses. They include, *inter alia*, sexual assault, prostitution and related offenses, obscenity, and offenses involving child pornography or sexual activity with children. J.A. 18-19.[6] A person convicted of any of these crimes may not obtain a license to operate a sexually oriented business for five years in the case of a felony or multiple misdemeanors, or two years in the case of a single misdemeanor. *Id.* at 19-20.

The Dallas City Council found that the enumerated sex crimes "render a person unable, incompetent, and unfit" to operate a sexually oriented business "in a manner that would promote the public safety and trust" (Pet. App. 74). The reason is that, as a licensed operator, such a person would be faced with "repeated opportunities" to commit additional offenses. *Id.* at 73. Because this would pose a very real threat to public safety

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existing license be revoked if it is determined that the licensee has been convicted of an enumerated offense for which the prescribed waiting period following the conviction has not elapsed. J.A. 23.

[6] Each of the offenses enumerated in the Dallas ordinance is defined in the Texas Penal Code, the relevant sections of which are cross-referenced in Chapter 41A.

and health, the City Council determined that a temporary disqualification from obtaining a license is desirable. *Id.* at 73-74.

As the City's findings make explicit, the sexually oriented business ordinance was enacted pursuant to the City's police power to regulate certain businesses and professions for the purpose of protecting and promoting public health and safety. Pet. App. 71. A well-established incident of this governmental power is the right to bar from certain occupations or activities persons who have committed certain crimes.

In *Hawker v. New York*, 170 U.S. 189 (1898), for example, this Court upheld New York State's permanent ban against granting physicians' licenses to persons who had committed felonies. In permitting such disqualification, *Hawker* relied directly on "'[t]he power of the state to provide for the general welfare of its people.'" *Id.* at 194 (quoting *Dent v. West Virginia*, 129 U.S. 114, 122 (1889)). The Court found that it was within the State's police power to "prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine." 170 U.S. at 191.[7]

The Dallas City Council found a direct relationship between the enumerated offenses and "the ability, capacity, or fitness required to perform the duties and dis-

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[7] Of course, the legitimate exercise of this aspect of the police power is not restricted to the exclusion of persons from professions involving the provision of health care. This Court has upheld disqualifications of certain classes of persons, including criminals, from other occupations. For example, in *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), the Court sustained the Transit Authority's ban on the employment of drug users, including those on methadone maintenance programs. Similarly, in *De Veau v. Braisted*, 363 U.S. 144 (1960), the Court upheld a New York law disqualifying convicted felons from waterfront union employment. "Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas." *Id.* at 158-59.

charge the responsibilities of the licensed occupation" (Pet. App. 73). The City could reasonably conclude that a person responsible for operating a business focused predominantly on sex should not have a recent history of committing sex crimes. " 'It cannot be doubted that the legislature has authority, in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be trusted witn the discharge of its duties.' " *Hawker v. New York*, 170 U.S. at 194 (quoting *State v. State Medical Examining Board*, 32 Minn. 324, 327, 20 N.W. 238, 240 (1884)).[8] *See also Richardson v. Ramirez*, 418 U.S. 24 (1974) (sustaining one of the many state statutes that deny convicted felons the right to vote).

B. The Principal Concern Of The First Amendment Is The Free Flow Of Expression, Not The Commercial Exploitation Of Sexually Explicit Material By Convicted Criminals

Petitioners' challenge to the licensing restrictions that Dallas imposes on certain convicted criminals does not deny the City's legitimate interest in protecting its citizens or the City's power to do so. Indeed, petitioners seem to acknowledge that the City has a "substantial governmental interest in controlling crime" (FW/PBS Br. at 20). Nevertheless, petitioners contend (*ibid.*), Dallas may not deny licenses to convicted criminals unless the City first shows that direct, immediate, and irreparable damage will result if the ordinance's temporary disqualification is not imposed.

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[8] Notwithstanding petitioners' argument to the contrary (M.J.R. Br. at 23-24, 27-33), this rule is equally applicable when the crime in question is obscenity, rather than a crime that directly threatens the physical safety of the public. Like the other enumerated offenses, the crime of obscenity involves past conduct that the Dallas City Council could reasonably find renders a person unfit to sell sexually explicit material. Certainly, the operation of sexually oriented businesses provides "repeated opportunities" to commit the crime again.

Petitioners try to justify this position by vastly exaggerated assertions of their First Amendment interest in operating sexually oriented businesses. Petitioners repeatedly claim that the ordinance "will result in the absolute suppression of . . . protected First Amendment activity" (*id.* at 23), but they completely ignore the highly tenuous relationship between their commercial enterprises and the core concerns underlying the First Amendment's guarantees. As the courts below recognized, the Dallas ordinance should be evaluated on the basis of a realistic appraisal of its practical effects, not on the basis of petitioners' inflated rhetoric.

While the ordinance has little or no impact on any legitimate First Amendment interest of convicted criminals, it contributes substantially to the City's salutary goals of protecting the health and welfare of the public, reducing crime, and preserving property values. The ordinance imposes no restriction whatever on the right of convicted criminals or members of the public generally to send or receive any message they wish. Neither creators nor consumers of expression are affected. Any tangential First Amendment interest that petitioners may have in the commercial exploitation of sexually explicit materials by convicted criminals cannot displace the City's indisputable substantial interest in regulating sexually oriented businesses for the common good.

The First Amendment was designed to protect the right of a creator to reach his audience. "The central concern of the First Amendment . . . is that there be a free flow from creator to audience of whatever message a film or a book might convey." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 77 (1976) (Powell, J., concurring); *see also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("the protection afforded is to the communication, to its source and to its recipients both"). The constitutional guarantee of free speech " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *New*

York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

Outlets where protected material may be sold and purchased may be necessary for the "free flow of information from creator to audience." It is, however, a giant step from this point to petitioners' premise that all persons, including recently convicted sex offenders, must have an unqualified right to sell all materials arguably entitled to First Amendment protection.

Here, it is uncontested that there are ample outlets in Dallas for persons to purchase sexually explicit books or films or to watch live or filmed performances of similar content. This is therefore not a case about whether certain information or expression may be disseminated. The issue is solely whether persons recently convicted of particular crimes may operate a particular kind of commercial enterprise.

Young v. American Mini Theatres is instructive in this regard. There, the Court sustained an ordinance that forced the relocation of two "adult" movie theatres. The Court rejected the argument that the ordinance created an impermissible restraint on protected communications, noting that "[t]here is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare." 427 U.S. at 62. No such claim exists on this record either.

Petitioners (and the criminals they seek to protect) are neither creators nor consumers of expression. They are intermediaries engaged in the business of selling sexually oriented material, for the sole end of making money. Petitioners, like the adult movie theater operators in *American Mini Theatres*, are nothing more than "commercial purveyors[s]. They do not profess to convey their own personal messages through the movies they show, so that the only communication involved is that contained

in the movies themselves." 427 U.S. at 78 n.2 (Powell, J., concurring).

The First Amendment is not concerned with commercial selling for its own sake.

> The inquiry for First Amendment purposes . . . looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them? . . . At most the impact of the ordinance on these interests is incidental and minimal.

Young v. American Mini Theatres, 427 U.S. at 78 (Powell, J., concurring). As Justice Powell's opinion makes clear, any significant First Amendment concern with ordinances regulating the commercial distribution of sexually explicit fare must focus on the rights of the creators of such material and their audience. The Dallas ordinance temporarily bars some convicted criminals from operating sexually oriented businesses, but for First Amendment purposes the important point is that sellers are fungible. And there is an ample number of such sellers in Dallas.

By petitioners' own admission (FW/PBS Br. at 6), the only showing on this record is that one out of 165 license applicants was denied a license because of an obscenity conviction, and that denial was reversed by the Permit and License Appeal Board. Two out of 165 applicants had their licenses revoked because of obscenity convictions, and 147 out of 165 license applications were granted. Affidavit of Steven Foster (submitted to this Court as an attachment to the City's response to petitioners' application for stay and recall of mandate).[9]

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[9] Contrary to petitioners' suggestion (FW/PBS Br. at 7), the Foster affidavit does not describe the disposition of the remainder of the 165 license applications.

The Dallas ordinance therefore does not have the effect of suppressing or restricting access to lawful speech. *See Young v. American Mini Theatres*, 427 U.S. at 71 n.35 (plurality opinion). "Viewed as an entity, the market for this commodity is essentially unrestrained." *Id.* at 62 (opinion of the Court).

C. The Occupational Disability Created By Chapter 41A Constitutes A Permissible Statutory Discrimination

Because it affects only former criminals and is imposed because of their particularly demonstrated threat to society, and because it affects not their right to free speech but only their economic interests, the temporary "occupational disability" imposed by Chapter 41A is properly analyzed under the Equal Protection Clause of the Fourteenth Amendment and not as an infringement of fundamental rights.[10]

In the areas of economics and social welfare, a classification will be upheld if it has some reasonable basis and if it bears a rational relationship to a permissible state objective. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). "[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). "'A statutory discrimination will not be set aside [under the Equal Protection Clause] if any state of facts reasonably may be conceived to justify it.'" *Dandridge v. Williams*, 397 U.S. at 485 (quoting *McGowan v. Maryland*, 366 U.S. at 426). This standard "has consistently been ap-

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[10] *Cf. Lewis v. United States*, 445 U.S. 55, 67 (1980) (characterizing 18 U.S.C. § 1201's prohibition of possession of firearms by felons to be a "civil firearms disability, enforceable by a criminal sanction").

plied to state legislation restricting the availability of employment opportunities." *Dandridge v. Williams*, 397 U.S. at 485. Thus, in *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), this Court upheld, as consonant with the Equal Protection Clause, the New York City Transit Authority's ban on the employment of drug users, including those on a methadone maintenance program.

> [T]he "no drugs" policy now enforced by TA is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists. Accordingly, an employment policy that postpones eligibility until the treatment program has been completed, rather than accepting an intermediate point on an uncertain line, is rational. It is neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass.

Id. at 591-92 (footnote omitted). Similarly, in *Hawker v. New York*, 170 U.S. at 196, the Court found that:

> When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject matter, but is only appealing to a well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state?

Petitioners do not and could not contend that the provisions of Chapter 41A temporarily disqualifying persons convicted of sexual offenses from operating sexually oriented businesses are not "rationally related" to the legitimate state interest of protecting public safety. The correlation between sexually oriented businesses and an increased incidence of crime is well established, as the

Dallas City Council found. That should be the end of the matter. "It is by . . . practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered." *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949).

II. CHAPTER 41A DOES NOT IMPERMISSIBLY DISCRIMINATE AGAINST SEXUALLY ORIENTED BUSINESSES

Petitioners also argue that Chapter 41A impermissibly treats sexually oriented businesses differently from other businesses, thus allegedly imposing a "content based" restriction on the exercise of First Amendment rights. This Court's recent decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), effectively answers this contention.

In *Renton*, the Court reviewed a zoning ordinance that applied exclusively to adult motion picture theaters. Relying on *Young v. American Mini Theatres*, the Court held that, "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." 475 U.S. at 49. In the Court's view, even though the ordinance singled out adult theatres for regulation, it was nevertheless appropriate to test the ordinance's validity under a content-neutral standard. The Court explained that "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" *Id.* at 48 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 771) (emphasis in *Renton*).

The same reasoning applies here. As the Dallas City Council made clear, Chapter 41A was motivated by a desire to regulate the secondary effects of sexually

oriented businesses, not by a desire to muzzle a particular kind of speech. The ordinance's focus on businesses that purvey a certain kind of material therefore does not discriminate impermissibly against a form of expression protected by the First Amendment.

Chapter 41A imposes nothing more than reasonable time, place, and manner restrictions on sexually oriented businesses. With the exception of the temporary disqualification of certain convicted criminals, no ordinance section provides for denial of a license on grounds that cannot be avoided or cured by a license applicant at the time of application. Such "content-neutral" time, place, and manner regulations "are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 47. Chapter 41A satisfies both of these criteria.

As discussed above, Chapter 41A was designed to serve the substantial state interest of protecting public health and safety. Here, as in *Renton* (*see* 475 U.S. at 51), the City acted on the basis of substantial evidence concerning the adverse secondary effects of sexually oriented businesses. And Chapter 41A leaves open ample alternative avenues of communication. The ordinance does not restrict in any way the number or kind of sexually oriented businesses that may operate. Nor does it attempt to regulate the protected material that may be sold there. Under the standards enunciated in *Renton*, the Dallas ordinance should be sustained.[11]

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[11] With respect to petitioners in No. 88-49, operators of "adult motels," the argument that Chapter 41A impermissibly discriminates against sexually oriented businesses fails for an additional and perhaps even more fundamental reason. The regulation of such businesses does not implicate First Amendment concerns at all, and special licensing requirements for motels that rent rooms for periods shorter than ten hours cannot possibly be "content based." Renting a motel room for a two-hour interval is not itself expression, and the fact that people may associate with each other

Petitioners' attempted reliance on *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), is misplaced. There, the Court "struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax had the effect of singling out newspapers to shoulder its burden." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986). The Court found the newsprint and ink tax unconstitutional because "differential treatment, unless justified by some special characteristic . . ., suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." 460 U.S. at 585.

Here, although Chapter 41A obviously "singles out" sexually oriented businesses for regulation, the differential treatment imposed by the ordinance upon such businesses is "justified by some special characteristic." It is in fact justified by several "special characteristics" associated with sexually oriented businesses, including increased crime, increased incidence of sexually transmitted disease, diminished property values, and urban blight. Pet. App. 72-73. The affected entities here are businesses historically associated with crime and other adverse secondary effects, not newspapers historically associated with free speech. Significantly, petitioners have not challenged the City Council's findings, based on "convincing documented evidence," that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution, and for casual sexual liaisons, that "a substantial number of arrests for sexual crimes have been made" in such establishments,

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or express themselves inside a motel room does not mean that the City may not legitimately decide that motels that permit short-term rentals require special regulation. The Dallas ordinance imposes no limits on either "intimate association" or "expressive association," as those terms have been used in this Court's recent decisions, and the ordinance's application to adult motels therefore raises no constitutional issue. *See City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

and that such businesses are associated, among other things, with increased crime. Pet. App. 71-72.

The same rationale also answers petitioners' challenge to the "open booths" section of the ordinance, Section 41A-19 (J.A. 32-35), and the municipal code compliance and administrative inspection sections, Sections 41A-5 (a)(6) and 41A-7 (J.A. 21). As the court of appeals held, "[t]he City could reasonably conclude that closed booths encourage illegal and unsanitary sexual activity in adult theatres." Pet. App. 11. Similarly, the fact that sexually oriented businesses often are open late at night and at odd hours justifies the provision permitting inspections at any time the business is open, rather than only during the hours when most other businesses are open.

III. CHAPTER 41A DOES NOT IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT

Petitioners' briefs are laden with rhetoric regarding the Dallas ordinance's alleged unconstitutional prior restraint on protected speech. The kernel of petitioners' argument is that all laws that require licenses and that permit license denial are presumptively unconstitutional prior restraints. See, *e.g.*, M.J.R. Br. at 10-12, 16, 22.

Petitioners are incorrect. "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957). The Constitution does not require absolute freedom to exhibit protected material at all times and places. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). As the Court held in *Young v. American Mini Theatres*, "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to . . . licensing requirements is not a sufficient reason for invalidating these ordinances." 427 U.S. at 62.

Every one of the cases that petitioners cite regarding unconstitutional prior restraints can be distinguished from this case on one of two grounds. Some unconstitu-

tional prior restraints impermissibly vest broad licensing discretion in an official who has the power unilaterally to revoke or deny a license on bases not articulated in the licensing legislation or not verifiable by reference to objective facts. *E.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). Other unconstitutional prior restraints require screening and thus threaten to exclude potentially protected material without certain procedural safeguards, such as expeditious judicial review of any such exclusion. *E.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965). The problems inherent in each of these kinds of prior restraint are absent from Chapter 41A.

The Dallas ordinance does not vest impermissibly broad discretion in any licensing official. Under Section 41A-5, the licensing official is required to approve the issuance of a license within 30 days unless he finds one or more of several objectively ascertainable facts. J.A. 17-20. Similarly, under Section 41A-9 (J.A. 22-23), which governs suspension of licenses, and under Section 41A-10 (J.A. 23-25), which governs license revocation, the licensing official *must* suspend or revoke the license involved if he finds any of the objectively ascertainable ordinance violations specified in those sections.

Petitioners object in particular to Section 41A-5(a)(8), which, as amended after the district court's decision, requires the denial of a license application filed by a person who, while employed in a sexually oriented business during the 12 months before the application, "has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers" (J.A. 18). See M.J.R. Br. at 41-42. Petitioners' argument that this provision permits the exercise of unbridled discretion ignores the section's final clause: "thus necessitating action by law enforcement officers."

This language, which was added to Section 41A-5(a)(8) after the district court invalidated the original ver-

sion of that provision, follows the same approach that the City adopted in the original version of the corresponding license suspension provision, Section 41A-9(5), a provision that the district court expressly sustained. Pet. App. 65 n.29. The district court specifically suggested that the excessive discretion found in the original version of Section 41A-5(a)(8) could be cured by amending the provision to require "action by law enforcement officers," as in Section 41A-9(5). Pet. App. 66 n.31. That is exactly what the Dallas City Council did. *Id.* at 106. The resulting provision does not confer unfettered discretion; it is "limited by its language to certain objective indications of an ability to operate a business peacefully" (*id.* at 65 n.29). Petitioners have not identified a single instance of allegedly improper discretionary action under this or any other provision of the ordinance.

Nor is Chapter 41A objectionable as a prior restraint that screens potentially protected speech. In *Arcara v. Cloud Books, Inc.*, an "adult bookstore," where solicitation of prostitution and other forms of illicit sexual activity had been found to have occurred, was closed under a New York nuisance statute. This Court overturned the New York Court of Appeals' finding that the closure order constituted a prior restraint. The Court explained (478 U.S. at 705 n.2):

> The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials since respondents are free to carry on their bookselling business at another location . . . . Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

Like the closure order upheld in *Arcara*, Chapter 41A does not prohibit or restrain the dissemination of par-

ticular materials or any materials at all.[12] It follows that any license revocation or denial in Dallas would be based not upon the dissemination of protected materials but upon noncompliance with the provisions of Chapter 41A. That is precisely the kind of situation in which the special procedural requirements outlined in *Freedman v. Maryland*, 380 U.S. 51 (1965), are not implicated.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[12] Petitioners seize upon *Arcara*'s observation that "*respondents* are free to carry on their bookselling business at another location" (emphasis added). Petitioners argue that, as to those convicted criminals who may not operate a sexually oriented business for up to five years, the ordinance clearly effects a prior restraint. FW/PBS Br. at 23; M.J.R. Br. at 23-27. As already discussed, however, and as the quoted language from *Arcara* implies, the First Amendment protects materials offered for sale, not a convicted criminal's right to operate a sexually oriented business. In *Near v. Minnesota*, 283 U.S. 697 (1931), a prior restraint statute forbidding a publisher from issuing future editions of his newspaper both suppressed the newspaper and "put the publisher under an effective censorship." *Id.* at 712. Here, neither publisher nor publication is being suppressed or censored. The Dallas ordinance does not in any way restrict publication by particular persons or the sale of specific materials. The only thing foreclosed is operation of a sexually oriented business by persons recently convicted of certain sexual offenses. Any materials that could be sold by such a person can, of course, also be made available in sexually oriented businesses operated by persons who have not been convicted.